UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of TRUSTEES OF TUFTS COLLEGE Employer[1] and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 509 Petitioner	Case 01-RC-166588

DECISION AND ORDER[2]

Petitioner Service Employees International Union, Local 509 (SEIU) seeks to represent a bargaining unit of all tenured and tenure-track basic science faculty, including assistant professors, associate professors, and professors, employed by the Employer (the University) at its Tufts University School of Medicine (School of Medicine). There are 70 basic science faculty in the petitioned-for unit. The University contends that the petition should be dismissed on the ground that all of the basic science faculty are managerial employees and/or statutory supervisors.

[1] The name of the Employer appears as amended at the hearing.

[2] The petition in this case was filed under Section 9(c) of the Act. The parties were provided an opportunity to present evidence on the issues raised by the petition at a hearing held before a hearing officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer.

I find that those basic science faculty with research labs who currently have direct reports in their labs are statutory supervisors. I further find that all of the petitioned-for basic science faculty are managerial employees.[3] Accordingly, I shall dismiss the petition.

MANAGERIAL STATUS OF THE BASIC SCIENCE FACULTY

Overview

Tufts University is a private, non-profit university with its main campus in Medford, Massachusetts. The University is headed by a President, a Provost, and a Board of Trustees. The University operates several component schools, including the School of Medicine at issue in this case, which is located on its Health Sciences Campus in downtown Boston, Massachusetts.[4]

The mission of the School of Medicine is to train physicians and other healthcare professionals, to train public health professionals, to train biomedical scientists, and to conduct research that impacts human health.

Dean Harris Berman, who reports to the President and Provost of the University, is the School of Medicine's chief academic officer and is ultimately responsible for the management of its programs. The School of Medicine is composed of 20 clinical departments[5] and 4 basic science departments: Molecular Biology and Microbiology; Neuroscience; Integrative Physiology and Pathobiology; and Developmental Molecular and Chemical Biology. Each of the four basic science departments is headed by a department chair who reports to Dean Berman.[6]

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[3] SEIU seeks to exclude two additional basic science faculty members, Associate Professors Alvar Gustafson and Peter Brodeur, on the ground that they lack a community of interest with the bargaining unit faculty and are managerial employees and/or statutory supervisors. The University takes the position that Gustafson and Brodeur are supervisors and/or managerial employees on the same basis as the other basic science faculty. Because I have found that all of the basic science faculty are managerial employees, I need not reach the issue of whether Gustafson and Brodeur should be excluded for lack of community of interest or are managerial employees or statutory supervisors on some basis distinct from that of the other basic science faculty.

[4] The School of Medicine also has satellite campuses at Maine Medical Center in Portland, Maine and at Baystate Medical Center in Springfield, Massachusetts. All of the petitioned-for faculty work at the Boston campus.

[5] The 20 clinical departments include, for example, the Departments of Surgery, Medicine, Radiology, Pediatrics, and Emergency Medicine.

[6] The department chairs, who are excluded from the unit, are the interface between the faculty and the administration. They assist the faculty in launching and maintaining their research programs, take a lead role in hiring new faculty and in the promotion and tenure process, and manage

The School of Medicine has three degree-granting branches. Its Medical School trains medical students who graduate with M.D. degrees. Its Public Health and Professional Degree branch offers various master's and doctoral programs in public health and similar fields, a master's program that trains physician assistant students, and a master's program in biomedical sciences that is intended to strengthen the applications of medical school candidates. Finally, the School of Medicine's Sackler School of Graduate Biomedical Sciences (Sackler School) offers doctoral and master's programs that train graduate students to conduct biomedical research.

Basic science faculty have three main responsibilities: research, teaching, and service/administrative duties. They are expected to spend about 60 percent of their time engaged in biomedical research, which is the core of their work. To that end, the vast majority of them operate labs, many of which have employees who carry out the day-to day research activities.

Basic science faculty are expected to spend 40 percent of their time engaged in teaching and service. Although most of the basic science faculty teach primarily at the Sackler School, they may teach in all three branches of the School of Medicine programs or predominantly in only one. They conduct about 90 percent of the teaching at the Sackler School, about 12.5 percent of the teaching in the first two years of the M.D. program, and about 55 percent of the teaching in the masters in biomedical sciences program for medical school hopefuls. A small number also teach in the Physician Assistant Program.

The basic science faculty's service and administrative work may include service on standing or ad hoc committees, service as a program director or course director, or service as vice chair of a department.[10]

School of Medicine structure and governance

The School of Medicine operates pursuant to bylaws adopted by the faculty and approved by the University's Board of Trustees. The bylaws establish the governance structure for the School of Medicine, including its two main governing bodies, the Executive Council and Faculty Senate.[11]

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[9] The appointments of the research-track faculty are subject to external funding and may be terminated if external funding terminates or is insufficient to provide full compensation. The research faculty, who are not tenurable, are excluded from the petitioned-for unit.

[10] Of the 72 basic science faculty, 42 currently serve on one or more standing or ad hoc committees, 67 have served one or more standing or ad hoc committees at some point since 2000, and 5 of them, including one faculty member who had not yet arrived at the time of the hearing, have never served on any standing or ad hoc committees.

[11] As further described below, the School of Medicine's M.D. program, like all M.D. programs, is accredited by the Liaison Committee on Medical Education (LCME). LCME standards on the topic of governance provide, "A medical education program should ensure that there are

The Executive Council is the decision-making body of the School of Medicine. Its purpose is to establish and implement policies for the school, primarily through the oversight of various standing committees and the creation of ad hoc committees. It also recommends to the University's Board of Trustees all candidates for degrees offered by the school. The Executive Council is composed of the Dean of the School of Medicine, the chairs of the four basic science departments, the chairs of the 20 clinical departments, the chair of the faculty senate, an academic dean or officer from each of the various teaching hospitals with which the School of Medicine is affiliated, the President and Provost of the University (who do not usually attend Executive Council meetings), the Dean of the Sackler School, one alumnus, and a student representative. The only member of the School of Medicine Executive Council who could possibly be one of the petitioned-for basic science faculty members would be the chair of Faculty Senate, but there is currently no basic science faculty member on the Executive Council.

The Faculty Senate, an elected body, represents the faculty of the School of Medicine and advises the Dean and School of Medicine Executive Council on matters of concern to the faculty. It may request information, communicate its positions, be informed at an early stage by the dean of any plans affecting the School of Medicine, and review and request reconsideration of certain actions of the Executive Council and standing and ad hoc committees. It may receive the financial information necessary to evaluate the budget of the School of Medicine and suggest budget priorities. Each clinical and basic science department elects one member to the Faculty Senate, and basic science faculty also have some at-large members. Total basic science representation is either seven members or 25 percent of the total Faculty Senate membership, whichever is greater.

Apart from the Faculty Senate, the bylaws give the entire faculty of the School of Medicine the right to establish, subject to trustee approval, educational objectives, the content and form of the curriculum, and the requirements for awarding of degrees. The bylaws give faculty the right to recommend promotion and degree certification of students to the Executive Council, to recommend admissions and disciplinary policies for students, to recommend appointments and promotions within the faculty, to elect members to the standing committees, to render advice to and petition the Dean on matters of concern, and to recommend revisions to the bylaws.

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mechanisms in place for direct faculty involvement in decisions related to the program. Important areas in which direct faculty involvement is expected include admissions, curriculum development and evaluation, and student promotions. Faculty members should also be involved in decisions about any other mission-critical areas. Strategies for assuring direct faculty participation may include peer selection or other mechanisms that bring a broad faculty perspective to the decision-making process, independent of departmental or administration points of view. .A medical education program must establish mechanisms to provide all faculty members with the opportunity to participate in the discussion and establishment of policies and procedures for the program, as appropriate."

The bylaws establish various standing committees of the School of Medicine, some of which will be discussed below: Basic Science Faculty Appointment, Promotion and Tenure Committee, Curriculum Committee, Admissions Committee, Student Ethics and Promotions Committee, and Faculty Grievance Committee.[12]

In addition, the School of Medicine creates ad hoc committees from time to time, some of which will be discussed below.

Dean Berman is assisted in running the School of Medicine by a leadership team that meets weekly, which includes the Dean of the Sackler School, the Dean of the Professional Degree Programs, the Dean of Education, the Executive Associate Dean, two Deans of Student Affairs, a Dean of Multicultural Affairs and Global Health, a Dean of Clinical Affairs, a development administrator, and a public relations administrator.

Sackler School structure and governance

The Sackler School is headed by Dean Naomi Rosenberg, who reports to Dean Berman and the Provost.[13] The Sackler School has about 200 faculty, including the 70 petitioned-for basic science faculty. The Sackler School has a Basic Science Division that offers eight Ph.D. programs: biochemistry; cellular and molecular physiology; cell and molecular developmental biology; molecular microbiology; neuroscience; genetics; immunology; and pharmacology and experimental therapeutics and pharmacology and drug development. Ninety percent of the courses in the Basic Science Division are taught by basic faculty members, and each of the eight basic science degree programs is headed by a program director who is a basic science faculty member.[14]

The Sackler School and the Medical School also offer a joint M.D./Ph.D. program, whose program director is a basic science faculty member. Finally, a Clinical

[12] Other School of Medicine standing committees in which basic science faculty participate are the Committee on Committees and the Academic Research Awards Committee. The Committee on Committees determines the size and composition of certain standing committees and nominates candidates for election to standing committees. Currently two of its six members are basic science faculty members. The Academic Research Awards Committee administers an awards fund and recommends research honors for graduating medical students. It is composed of twelve faculty, two of which are basic science faculty.

[13] The Dean of the Sackler School is appointed by the University Board of Trustees, upon recommendation of the University's president, without input from the faculty. The Dean of the School of Medicine is also appointed by the University's Board of Trustees, and there is no evidence of faculty input into that appointment.

[14] The program directors, who are elected by the Sackler faculty, are responsible for leading the faculty who teach within their programs. They coordinate the courses, coordinate the admission of students to their programs, convene faculty to review student progress, and participate in five-year reviews of their programs. SEIU seeks to include in the unit those basic faculty members who serve as program directors.

Research Division at the Sackler School offers a masters and doctoral program in Clinical and Translational Science, whose program director is a clinical faculty member.

The Sackler School operates pursuant to bylaws established by the University's Board of Trustees. The bylaws establish, *inter alia*, an Executive Council for the Sackler School. The Sackler School Executive Council is composed of the President of the University, the Provost of the University, the Dean of the Sackler School, an Associate Dean of the Sackler School, the nine Program Directors for each of the Sackler programs, the program director for the M.D./Ph.D. program,[15] and two student representatives. The President and Provost of the University do not generally attend Sackler School Executive Council meetings, and the Dean, Associate Dean, Program Director for the M.D./Ph.D program, and two student representatives are non-voting members. Thus, eight of the nine voting members of the Sackler School Executive Council are basic science faculty members. The Executive Council is responsible for operating the Sackler School, including long range planning and approving the recommendations and actions of other committees.

The Sackler bylaws also establish two standing committees: the Programs and Faculty Committee, which is discussed below, and the Nominations Committee.[16] The Sackler School also has an ad hoc Awards Committee.[17]

The Sackler School bylaws state that it shall be the function of the Sackler School faculty to recommend to the University's Board of Trustees all candidates for degrees at the Sackler School, to receive reports on the actions of the Executive Council and standing committees, to require reconsideration of the actions of the Executive Council, and to elect members to the standing committees. Members of the faculty within each division, Basic Science and Clinical, shall decide all questions of educational policy within that Division, including the admission of students to programs under its control and the academic supervision of students, and to control all degree programs within the Division.

Hiring of basic science faculty and appointment to the Sackler School

Basic science faculty are hired by one of the four basic science departments within the School of Medicine and are simultaneously appointed as faculty members of the Sackler School. They are compensated pursuant to the budget of their basic science

[15] M.D./Ph.D. Program Director James Schwob is a basic science faculty member in the petitioned-for unit, but is a non-voting member of the Sackler School Executive Council.

[16] The Sackler School Nominations Committee solicits nominations and prepares election slates. Its six current members are all basic science faculty in the petitioned-for unit.

[17] The Sackler School Awards Committee members are appointed by Sackler School Program Directors. Five of its six current members are basic science faculty. The record does not reveal its function.

department rather than by the Sackler School, which has no budget for faculty compensation and depends on the School of Medicine for its operating budget. Thus, basic science faculty are employed by their department rather than by the Sackler School.

Department chairs negotiate with the Dean over filling vacancies or hiring additional faculty within their departments, which is contingent on a budget that the Dean must discuss with a higher level of authority at the University.[18] In periodic program reviews, discussed below, faculty have from time to time recommended increased hiring in certain departments, but the record does not reveal whether these recommendations were ever followed.

Once a slot becomes available, the department chair and faculty in the department discuss the area of research they want to build in their department and the academic rank at which the new faculty member will be hired, i.e., assistant, associate, or full professor. An ad describing the type of researcher sought is placed, and the faculty, who in some cases are part of a search committee that reports back to the entire faculty, conduct interviews. Candidates also present a seminar to the entire faculty in the department about the type of research program they hope to establish. Dean Rosenberg testified that the faculty rank the candidates and that, if one is a fit, the department chair initiates negotiations with that person before a final appointment offer is made. The record does not reveal precisely how this process works or what happens in the event of a disagreement between the department chair and the department faculty over the selection of a candidate. Although it is common for Dean Rosenberg and Dean Berman to meet with new hires at the request of a department chair, they do not participate in deciding which candidate to hire. The compensation of new faculty is negotiated between the department chair and the faculty member, and Dean Berman is also involved in setting the salaries of new hires, which may range from $150,000 to upwards of $250,000, depending on academic rank and on the competitiveness of the institution from which the new hire comes.

New basic science faculty members are simultaneously nominated for appointment as a member of the faculty in a particular degree-granting program of the Sackler School. As part of the appointment process, prospective Sackler faculty are invited by the program director to present a seminar describing their research to the Sackler faculty, and they may meet with graduate students in the program.[19] The faculty

[18] Department chairs are appointed by the Dean of the School of Medicine. Faculty have input into the process, in that the Dean may appoint them to a search committee that makes a recommendation to the Dean over the selection of a department chair, but the faculty does not get a formal vote on the matter. If there is a search for a basic science department chair, the search committee would be composed predominantly of basic science faculty.

New department chairs negotiate with the Dean over the number of new tenure-track faculty that they may hire, a number that is set forth in the department chair's appointment letter from the Dean.

[19] New faculty hires receive an offer letter from Dean Berman and the relevant Department Chair outlining the terms of their appointment. The letter notes that they will be expected to train

then vote on the individual's appointment to Sackler.[20] If the vote is positive, the program director prepares a letter to Dean Rosenberg proposing the nomination of that candidate. Then the Sackler School Programs and Faculty Committee,[21] followed by the Sackler School Executive Council, each vote on the appointment. After a positive vote, the Dean of the School of Medicine and Provost of the University recommend the appointment to the President of the University. This same process is followed both for new hires and for existing School of Medicine faculty who seek to teach at the Sackler School.

All of the petitioned-for basic science faculty are members of the Sackler School faculty, because it is an expectation as part of their appointment to the School of Medicine and because they may have graduate students working in their labs only if they are members of the Sackler School. Dean Rosenberg testified that about 150 appointment recommendations to the Sackler School have been made since 2004, when she became Dean. She could think of no instance in which any basic science faculty member's nomination to the Sackler School was rejected by the faculty[22] and no instance in which the Dean, Provost, or President rejected the faculty's recommendation to appoint a basic science faculty member to the Sackler School.

Funding of research labs

Newly-hired basic science faculty are provided with lab space at the Sackler School as well as a "start-up package" that enables them to set up their research labs and "kickstart" their research. Start-up packages for newly-hired basic science faculty range from half a million to over two million dollars, with an average of $1.6 million.[23] The faculty members have complete discretion to spend money from their start-up accounts

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graduate students at the Sackler School and, to that end, will be nominated for an appointment as a member of the Sackler School in a particular program. It is unclear from the record if the process of being appointed to Sackler, including giving a seminar, occurs before or after the offer from the department is made and whether the "audition" seminars given to departmental faculty and Sackler faculty are one and the same or different.

[20] Although not clear from the record, this would appear to be a vote by faculty in the relevant program.

[21] The Sackler School Programs and Faculty Committee is a standing committee with eight members who are not members of the Sackler School Executive Council. They are elected by the Sackler School faculty for three-year rotating terms. Currently, the Committee is composed of five basic science faculty and three clinical faculty members.

[22] There have been nominations of faculty other than basic science faculty that failed.

[23] The Department chair negotiates over the amount of the start-up package when recruiting new faculty. A renowned scientist who brings prestige to the School of Medicine will demand more money.

without approval by anyone else[24] and to determine the pace at which they spend the money.[25] They may use the money to hire personnel for their lab, to provide stipends for graduate students, or to purchase equipment and materials, such as centrifuges, microscopes, hoods, laboratory animals, chemicals, and biological reagents. Basic science faculty share some pieces of large or expensive equipment and may choose to use funds allocated to them to purchase large equipment to be shared by others in their department.[26]

There is no evidence that the University exerts control over the research topics pursued by basic science faculty, although basic science faculty are subject to a University-wide Scientific Integrity policy that spells out the consequences of misconduct in research.[27]

Basic science faculty are ultimately expected to fund their research with grants from external sources, such as the National Institute of Health (NIH), the National Science Foundation, the Department of Defense, entities such as the American Cancer Society and American Heart Association, pharmaceutical companies, and biotech companies. The University expects the basic science faculty to eventually reach a level of funding that provides 60 percent of their salary and benefits.[28] Grants also typically cover the salaries of any employees working on the funded project in the faculty member's lab.

In addition to the grant dollars paid directly to faculty members, grants typically include an indirect recovery cost that is paid to the University to help defray overhead

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[24] Executive Associate Dean Thomas Malone, who serves as chief operating officer and chief financial officer for the School of Medicine, testified that approval is required for expenditures on capital equipment over a certain threshold amount, but that such approval is just a formality.

[25] The appointment letters for new faculty note that most faculty draw down the funds over a three-year period, but the funds are not forfeited if not drawn down by that time.

[26] Thus, in Assistant Professor Marta Gaglia's 2013 appointment letter, her department chair and Dean Berman wrote that that funds made available to her for the purchase of large equipment could be used to support the purchase of a tissue culture room, an ultracentrifuge and real time qPCR machine, if that is what she chooses, that they anticipated that others in the department might be interested in using such items, and that they would like the items to be considered departmental so that others might feel welcome to use them with her consent.

[27] There is no evidence that the basic science faculty had any input into the establishment of this policy.

[28] For example, one offer letter to a new faculty member explained that junior faculty are expected to receive NIH research grant support by or before the end of their third year and to fund 60 percent of her salary and benefits by the end of their fifth year. Grants typically fund faculty members for a percentage of their salary based on the percentage of their time that they spend on the funded project. Basic science faculty who receive grants from NIH and other funding sources are referred to as "principle investigators" for purposes of the grant.

costs, such as lab space, utilities, infrastructure, highly sophisticated instruments used by the researchers, and administrative staff.[29] The percentage of the grant allocated to indirect recovery costs is negotiated between the University's Finance Office and the grantor. The percentage varies depending on the source of the grant, ranging from 10 to 20 percent from private grantors to 65 percent from NIH, which is the largest source of external funding. Basic science faculty generate $25 to $28 million per year in grant money, excluding indirect cost recovery, and the University received $10.4 million in indirect recovery costs from basic science faculty grants in its 2015 fiscal year.

Sometimes basic science faculty experience a temporary lapse in funding when a grant expires and is not funded again, but there is a high likelihood of funding if they resubmit their proposal. In order to keep a faculty member's research going in these circumstances, the University provides interim funding for a defined period of time, also referred to as bridge funding, to cover the hiatus period between grants. Requests for interim funding are submitted by department chairs to Dean Rosenberg, who determines whether to approve them. The money comes from the Sackler School's operating budget, which is funded by the School of Medicine. Seventy to seventy five percent of faculty with active labs received some bridge funding this year, and there are two departments where every faculty member with a lab, except two, is receiving interim funding. [30]

Executive Associate Dean Malone testified that income from faculty grants is critical to the School of Medicine. When a faculty members lose a grant, their salary does not decline, as the University is one of very few schools of medicine that fully fund the salaries of tenured faculty.[31] When a grant is lost, the University absorbs the costs of the faculty member's salary as well as the cost of stipends for graduate students in his or her lab, and the University also loses that portion of the grant money attributable to indirect cost recovery.

The role of basic science faculty in admitting and teaching Sackler School graduate students

In any given academic year, the Sackler School has about 250 students, on average, who are training to become biomedical scientists, and it admits about 50 new graduate students each year. There are currently 238 graduate students enrolled in Ph.D.

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[29] The University has administrative staff who assist faculty with their grant submissions and manage grant finances. In some cases, grantors request that the University contribute money toward the cost of very expensive equipment needed for a faculty member's research.

[30] The School of Medicine has spent $4.5 million on interim funding over the last two years and over $34 million since 2003, although the record does not reveal if all of it went to basic science faculty.

[31] Most other medical school guarantee only a portion of a tenured faculty member's salary.

and master's programs at the Sackler School. Ph.D. students typically take four to six years to complete their degrees, and master's students finish their degrees in two years.[32]

Ph.D. students receive a full tuition scholarship, valued at $19,326 this year, which is funded by the School of Medicine. They also receive an annual stipend, set at $33,000 for next year, and health insurance valued at around $4000. The Sackler School generally expects the stipend and health insurance costs for graduate students to be funded by grants held by a faculty member, once the student has joined a lab.

Dean Rosenberg determines the number of graduate students to be admitted to the Sackler School each year, based on the Sackler School budget. Dean Rosenberg makes a recommendation to the Sackler School Executive Council, which discusses the matter but does not vote on it. Sometimes the Sackler School Executive Council has advised Dean Rosenberg that the number of students to be admitted is too low. From time to time, as part of a periodic program review, the faculty has recommended an increase in the number of students in a program. On some occasions, Dean Rosenberg has accepted the recommendation of the Executive Council to increase the number of students, but there have been a number of times that she rejected a request by the Executive Council or faculty to increase the number of students, on the ground that it is very expensive to place a student in a unfunded lab, i.e., a lab in which the student's stipend is not funded by a grant from an external source. For example, in April 2014, 18 faculty from the program in Pharmacology and Experimental Therapeutics, including seven basic science faculty and two retired basic science faculty members, sent a letter to Dean Rosenberg asking her to fund unsponsored slots for one to two graduate students in their program for the fall of 2014, but she rejected their request.

With respect to the admissions process, it appears that the Executive Council establishes the admissions deadline.[33] Prospective students apply to the Sackler School through a computerized admission system. The staff in the Dean's office assemble the application documents and forward them to the relevant program. Each program determines how to handle its admission process. Certain faculty or a committee may be designated to review applications and interview applicants. A faculty member from the program notifies the Dean's office which students they wish to admit, and the Dean of the Sackler School issues the acceptance and rejection letters. Dean Rosenberg testified that her office has no say in which students are admitted, with the exception that she enforces minimum standards for admission, which is an accreditation requirement. In this regard, eight or nine years ago, Dean Rosenberg rejected an admission recommendation on the ground of the applicant's felony conviction, as the institute where the program was based

[32] Ph.D. students are expected to finish their degrees within seven years. Students who do not finish within that time frame must submit a detailed plan for completing their studies to Dean Rosenberg, who may or may not approve it. Requests for an additional extension of time must be submitted to the Sackler School Executive Council, which votes on whether the student will be allowed to continue in the program.

[33] Executive Council minutes for November 2015 reflect a vote to change the Sackler Admissions deadline for fall 2016.

would not give the applicant access to the facility. About five years ago, she rejected the application of a candidate who falsified letters of recommendation. Finally, she has rejected applicants for lack of proficiency in English.

Ph.D. students spend the first nine to eighteen months of their studies completing course work and then begin the research work that culminates in a thesis. After completing their course work, they do three to four eight- to ten-week rotations through the labs of faculty members, in order to see if they are interested in the type of research performed there and to get to know the style of the faculty member. The faculty use these rotations as an opportunity to find out which students would be a good fit for their lab. The Dean's office facilitates this process by asking the faculty if they are willing to accept a thesis student. In order to accept a student, the faculty member must have an active research program and at least 18 months of guaranteed funding to support the student's stipend and health insurance costs. Each program has a student advisor who helps the students identify the labs through which they wish to rotate. The students rank their choices, and the Dean convenes a meeting with the student advisors, who place the students in their rotations, although faculty members are the final decision makers and have the right to accept or reject students who want to rotate through their labs. After completing the rotations, students request to join a lab to conduct their Ph.D. thesis research, and it is up to the faculty member whether or not to accept the student into their lab. Currently, there are about 170 Sackler School students assigned to thesis labs, and 83 percent of them work in the labs of basic science faculty. The basic science faculty may have anywhere from zero to six graduate students assigned to their lab. Those faculty that have thesis students are responsible for mentoring them and helping them to develop the skills they need to complete their Ph.D. Having students benefits the basic science faculty, as they need students to perform work in their labs in order to achieve their own research goals.

The Sackler budget

The Sackler School has a budget of around $4 million, compared to the School of Medicine budget of $100 million. Program directors, all of whom are basic science faculty, are given a budget that they may use, at their discretion, to recruit prospective students[34] or to fund seminars and retreats. Dean Rosenberg does not approve the expenditures. However, without discussing the matter with the Sackler School Executive Council, Dean Rosenberg has reduced the amount available to fund retreats.

Reappointment, promotion and tenure

Newly-hired assistant professors are given a tenure-track appointment and a three-year contract, which is renewable at the end of their third year and the end of their sixth year. The processes for contract renewal after three and six years are similar, although

[34] Program directors may pay the transportation and meal costs of prospective students.

the expectations for faculty at each stage are different.[35] In each case, the department chair notifies the candidate of the upcoming review and assists in assembling a curriculum vitae (CV) and supporting documents. The tenured faculty in the candidate's department review the material and make a recommendation. The department chair prepares a summary of the departmental recommendation, which the Dean of the School of Medicine and department chair discuss, and the two of them determine whether or not to renew the candidate's contract for another three years. Dean Rosenberg testified that the Dean and the chair could or could not follow the faculty's recommendation, but there is no record evidence of any particular instance in which they chose not to follow the departmental recommendation. There have been instances where faculty members were not renewed, in at least one of which the departmental faculty, department chair and the Dean were all in agreement.

Basic science faculty are reviewed for tenure no later than their ninth year, although they occasionally apply sooner.[36] Their tenth year is either their first year with tenure or the terminal year of their appointment. New faculty hired with the rank of associate professor may receive a tenure-track appointment or they may go through the tenure process at the same time as their initial appointment. Newly-hired faculty with the rank of professor typically undergo the tenure process at the same time as their initial appointment.

Applications for promotion from assistant to associate professor generally occur in the context of tenure decisions, although basic science faculty may seek to be promoted to associate professor prior to their ninth year, without a tenure decision. Subsequently, they may apply for promotion to professor, the highest faculty rank.[37]

To begin the promotion and/or tenure process, the department chair meets with the candidate to discuss preparation of a dossier.[38] Then the tenured faculty in the candidate's department meet to discuss the candidate's achievements and vote on whether to recommend promotion and/or tenure. If the departmental vote is positive, the department chair proposes the candidate's candidacy to the Dean of the School of Medicine. The department chair has the right to oppose the decision of the departmental

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[35] By their third year, basic science faculty are expected to have established their lab, submitted grant proposals, and participated in teaching. By their sixth year, they are expected to have secured grant funding, published scientific papers, and played a larger role in teaching and service.

[36] Of the 70 petitioned-for basic science faculty, 59 are tenured professors or associate professors. Ten assistant professors and one associate professor are tenure-track.

[37] Promotion to professor typically includes a salary increase, and it is considered to be a mark of distinction and professional achievement.

[38] This includes, for example, a CV with a description of current research and funding, teaching portfolio, administrative responsibilities, and membership in or lectures to scientific societies; copies of important publications; and letters of recommendation.

faculty in favor of promotion or tenure, in which case a senior faculty member who supports the candidate may submit a letter of nomination to the Dean of the School of Medicine. Dean Rosenberg testified, however, that she knows of no instance in which a department chair disagreed with a departmental vote to support or reject a candidate's bid for promotion or tenure.

The next step is consideration of the application by the School of Medicine's Basic Science Faculty Appointment, Promotion and Tenure Committee of the School of Medicine (APT Committee), which, as noted above, is composed of 10 basic science faculty and one clinical faculty representative.[39] The APT Committee appoints a subcommittee of three members who are not from the same department as the candidate to review the candidate's dossier. The subcommittee summarizes its findings in a letter to the full APT Committee, which reviews the dossier and subcommittee report and votes as to whether to recommend promotion and/or tenure. If the vote is positive, the chair of the APT Committee sends a letter to the Dean of the School of Medicine recommending approval.

Then the Dean prepares a letter to the Provost of the University concurring with the APT Committee's recommendation or not. Since 2003, 29 tenure and/or promotion cases have come to the current and former Dean of the School of Medicine, and the two Deans accepted the recommendation of the APT Committee 27 times, including one rejection recommendation in academic year 2003-2004. In two cases, the Dean chose not to follow the APT Committee's recommendation to promote or grant tenure to a faculty member.[40]

Finally, the promotion and/or tenure decision must be approved by the Provost and the Academic Affairs Committee of the Board of Trustees of the University.[41] Dean Rosenberg testified that, on one occasion, the Provost rejected the recommendation of the Dean and APT Committee to promote a basic science faculty member.[42] However, she

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[39] The Sackler School Programs and Faculty Committee plays no role in the promotion or removal of faculty or in tenure decisions.

[40] The Dean concurred with the APT's recommendation to reject the bid of faculty member Lazinski for tenure in 2003-2004. The Dean rejected the 2005 bid of Associate Professor El-Bermani to be promoted to professor, despite a positive recommendation by the APT Committee. The Dean also rejected the APT's recommendation to approve tenure for basic science faculty member Schnitzler in 2007-2008. There had been a split vote by the APT Committee, and the Dean sided with the minority opinion in rejecting the candidate's bid for tenure.

[41] On one letter of recommendation to the Provost that was submitted into evidence, both the President and the Provost of the University noted their concurrence with the Dean's recommendation to grant a promotion to associate professor with tenure.

[42] In 2002, the Provost denied promotion without tenure to basic science faculty member Larry Moss, despite the recommendation of the APT Committee and the former Dean.

was unaware of the Board of Trustees ever disagreeing with the recommendation of the Dean and the Provost with respect to School of Medicine candidates.

Role of basic science faculty in the Sackler Programs and Faculty Committee

In addition to its role in approving faculty appointments to the Sackler School, described above, the Sackler School Programs and Faculty Committee plays a lead role in overseeing the curriculum at the Sackler School. As noted above, it is currently composed of five basic faculty members and three clinical faculty members.

The Sackler Programs and Faculty Committee must approve any new degree-granting programs offered by the Sackler School. Faculty who wish to establish a new program presents the proposed curriculum to the Committee, which votes whether or not to approve it. The Sackler Executive Council must also vote to approve new programs. If the proposal involves a new degree, the Provost of the University, the Academic Affairs Subcommittee of the University Board of Trustees, and the University Board of Trustees must also approve it.

Thus, its November, 2011 meeting, the Programs and Faculty Committee approved the creation of three new programs. The first was a master's in pharmacology and drug development. As this was a new degree, the proposal was then sent to the Sackler School Executive Council, the Provost, and the Academic Affairs Committee of the Board of Trustees, all of which approved the new degree. Second, the Programs and Faculty Committee approved new M.D./M.S. and M.D./Ph.D. programs in Clinical and Translational Science. The M.D./M.S. program went into effect with a positive vote by the Executive Council, without approval at the University level, because the Clinical and Translational Science Program already offered a master's degree, and it was only the combination of the two degrees that was new.[43] Third, the Programs and Faculty Committee approved the creation of a new program in Quantitative Biomedical Methods, with some modifications to the proposal. The Executive Council subsequently voted to table discussion of the new program, and it has not come up again.

The Programs and Faculty Committee also approves the merger of programs. Thus, in April 2014, the Committee approved the merger of three programs into a merged Cell, Molecular, and Developmental Biology Program. In May 2014, the Sackler School Executive Council approved the merger, and it became effective.

Faculty who wish to offer a new course must submit a proposal to the Programs and Faculty Committee, which reviews the material and makes a recommendation to the Sackler Executive Council, which also votes on the matter. If both bodies approve, the course is added to Sackler School's course offerings. Thus, the meetings for a 2010 meeting of the Programs and Faculty Committee reflect its approval of three new courses.

[43] The record does not reveal whether the M.D./Ph.D. program required approval at the University level and, if so, with what result.

The Programs and Faculty Committee also conducts a review of each Sackler School program every five years, as required by the Sackler School bylaws and an accrediting body. Prior to each review, the program director and faculty in the program to be reviewed prepare a document describing all aspects of the program. The Program and Faculty Review Committee creates a review committee composed of three members of the Program and Faculty Committee who are not faculty in the program under review, one faculty member from the University who is not a member of the Sackler School faculty, and two outside experts, usually faculty at other universities who have expertise in the discipline under review. Basic science faculty participate in these review committees.[44]

The review committee does a one-day on-site review and then prepares a report with recommendations that is reviewed by the program director, the Programs and Faculty Committee, and the Sackler Executive Council. The program director prepares a response that is discussed with the Executive Council. In most cases, the Executive Council votes to accept the review committee's report and the program director's disposal of the various recommendations. The program is responsible for following through with any recommended actions.

Various program reviews were submitted into evidence that recommended, for example, the creation of joint appointments between departments, increased funding from the School of Medicine to support students, changes to the admissions process, increased bridge funding for graduate students, increased teaching opportunities for graduate students and postdoctoral fellows, and renovated lab space for faculty. The record does not reveal whether any of those recommendations were implemented.

Some recommendations accepted by the Sackler Programs and Faculty Committee and Executive Council as part of the five-year review process, such as hiring more faculty for a program or increasing the number of students in a program, are often not followed. Dean Rosenberg explained that the Sackler School does not hire faculty, although she has encouraged program directors to see if there are faculty eligible for Sackler appointments who would meet their needs, and any increase in student admissions to a program is based on the availability of funded labs in which to conduct their training.

The Sackler School Executive Council

As noted above, the voting members of the Sackler School Executive Council are predominantly basic science faculty. In addition to its role in approving appointments to the Sackler School and approving various actions of the Programs and Faculty Committee, as described above, the Executive Council has other functions.

[44] For example, basic science faculty members Katya Heldwein and Athar Chishti were two of six reviewers of the Genetics Program in 2014. Basic science faculty member Charlotte Kuppwasser was one of six reviewers of the Molecular Microbiology Program in 2013.

The Sackler School Executive Council votes to approve the amount of the annual stipend for graduate students, which it recommends to Dean Rosenberg. Dean Rosenberg has never rejected the Executive Council's recommendation on this matter in her eleven years as Dean.

Minutes of various Sackler Executive Council meetings submitted into evidence reflect that the Council has promulgated various academic policies. For example, in 2012 and 2013, the Council voted to require basic science students to form a thesis advisory committee during the fall of their first research year, to meet with their committee at least once per semester or face specified academic consequences, and to require students to defend their thesis within a certain time frame. The Executive Council established a policy regarding whether students who receive an M.S. degree and leave will have to repeat certain courses if they apply to return to their Ph.D. studies. Although this happens rarely, on one occasion, the Executive Council changed a policy based on a recommendation in a five-year program review. The program in question accepted students who were committed to working for a specific lab and they did not rotate through several labs before committing to a lab. After two reviews criticized this approach, the Executive Council passed a policy requiring that all students rotate through various labs to give them a choice in research settings. Minutes for 2014 and 2015 show that the Executive Council modified the rotation policy for neuroscience students, modified a research laboratory fee policy concerning fees charged to students, and changed its policy of requiring two faculty thesis readers to one faculty member reader for a certain program. The Executive Council also approves the list of all degree candidates.

Role of the basic science faculty in the M.D. program

The M.D. program offered by the School of Medicine takes four years to complete and currently has about 800 medical students, 200 in each of the four years. Dean for Educational Affairs Scott Epstein, who reports to Dean Berman, oversees the Office of Education Affairs, which supports the course directors who deliver the 35 or so required courses taken by medical students in the first two years of the curriculum.

During the first two years of medical school, every student takes required courses in a fixed order. Most medical school courses are taught by clinical faculty, but basic science faculty teach extensively in a first-year course about the basic science underpinnings of disease. The course, entitled Medical Foundations I, encompasses biochemistry, cell biology, genetics, histology, immunology, and introduction to microbiology. During the third and fourth year of medical school, medical students rotate through various clerkships at teaching hospitals, where they are taught by clinical faculty.

Each medical school course is sponsored by a department, which selects the course director.[45] Both clinical and basic science departments sponsor courses. The

[45] Although course directors are selected by their departments, on one occasion in 2011, Dean Berman relieved a co-course director.

course directors orchestrate the delivery of the courses and determine whether to give some or all of the lectures themselves or to have other faculty members give some of the lectures. Eight basic science faculty are course directors at the medical school, primarily for first year courses. The rest of the course directors are clinical faculty.[46]

School of Medicine Admissions Committee

The School of Medicine's Admissions Committee, a standing committee created by its bylaws, makes all admissions decisions for the M.D. program. The Admissions Committee currently has about 77 members, including 14 elected members and 32 members who are appointed by the Dean of Admissions. Both elected and appointed faculty serve for three-year terms, and five to six new members are elected each year. The Committee also includes five administrators and about 25 fourth-year medical students, all of whom are voting members. Basic science faculty are eligible both to run for admissions committee membership and to vote in membership elections. There is no cap on the number of basic science faculty who may serve on this committee, nor do basic science faculty have a guaranteed number of slots on the committee. Currently, there are no basic science faculty among the 14 elected committee members, and only two of the 32 appointed members are basic science faculty.[47] Associate Dean of Admissions and Enrollment John Matias testified that, since 2001, the Admissions Committee has included only a small percentage of basic science faculty.

The Dean of Admissions determines the number of offers to be made to applicants. The School of Medicine receives about 9000 to 10,000 completed applications for its M.D. program each year. Using various criteria and computer software, the Dean of Admissions, Associate Dean for Admissions and Enrollment Services, and a faculty member select 1000 applicants who are offered an opportunity to interview at the School. During the interview season, the School of Medicine holds twice weekly interviews sessions, interviewing 24 applicants per day. There are usually 10 to 12 faculty members available to interview applicants at each session, and each applicant is separately interviewed by two members of the Admissions Committee, at least one of whom is a faculty member.[48] Interviewers complete an electronic evaluation form for each applicant that assigns points to the applicant based on the interviewers' answers to questions on the form.[49] At the end of the month, those Admissions Committee members, including faculty, administrators, and fourth-year medical students,

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[46] SEIU seeks to include those course directors who are basic science faculty.

[47] It appears from a list of Admissions Committee members in evidence that the rest of the elected and appointed members are clinical faculty.

[48] Fourth year students and administrators also conduct some of the interviews.

[49] Matias testified that, before the current evaluation form was adopted in 2006, members of the Admissions Committee were asked to weigh in and give final approval of the form, including how many points should be assigned for various areas of the evaluation form.

who participated in interviews that month, usually 25 to 45 members, meet to discuss and vote on that month's applicants. All of the candidates are ranked numerically based on the interviews and on other criteria, such as test scores. Those candidates who rank over a certain threshold number in the ranking system, a number which is determined by the Dean of Admissions, are generally admitted as a group, although an interviewer may request to individually discuss an applicant in that group. After that, the interviewers bring up for discussion those candidates whose applications they support. Those applicants who are not brought up for consideration by either interviewer will not be discussed and voted on. Each applicant needs at least 80 percent of the votes cast at the meeting to be admitted.

The admissions process for the M.D./Ph.D. program is separate from that for the M.D. program.[50] There is an M.D./Ph.D. committee, which assigns faculty to interview applicants. All applicants must interview with one of four core interviewers, three of whom are basic science faculty. There are also fourteen "regular" interviewers, nine of whom are basic science faculty. Finally, some candidates request to interview with certain faculty members, based on their research interests. For the current round of interviews, 14 of the 22 faculty in this category were basic science faculty. Dean Matias testified that the M.D./Ph.D. admissions committee has the ability to admit applicants but the record does not reveal whether the list of interviewers constitutes the full admissions committee or what the process is for selecting students for the program after the interviews.

In 2013, the Dean for Admissions initiated the creation of a task force to review the premed requirements that must be fulfilled by applicants to the M.D. program. The task force was chaired by the Dean of Admissions and included the School of Medicine's Dean for Educational Affairs, the director of pre-health advisor for undergraduates, two basic science faculty, two clinical faculty, and a medical student. In August 2013, the members of the entire Admissions Committee voted electronically whether or not to approve the proposed revisions to the premed requirements. The vote was 63 to 2 in favor, and the new pre-med requirements were implemented.

School of Medicine Curriculum Committee

The School of Medicine's Curriculum Committee is responsible for implementing educational policies and for evaluating course content, primarily for the M.D. program.[51] The 33 voting faculty and administration members include Dean for Educational Affairs Scott Epstein, 17 elected faculty members, and 15 appointed faculty members. In

[50] M.D./Ph.D. students attend the first two years of medical school. Then they spend about four years at the Sackler School pursuing a Ph.D. After that, they complete the final two years of medical school.

[51] This Curriculum Committee also handles issues related to a joint M.D./Master's in Public Health program and a joint M.D./Master's of Business Administration program. It does not involve itself in matters relating to degree programs at the Sackler School.

addition, there are 16 medical student members, four from each year of medical school, who may cast no more than eight votes in total.[52] Of the 33 faculty and administration members on the Curriculum Committee, there were or are five basic science faculty in the 2013-2014 academic year, four basic science faculty in 2014-2015, and four basic science faculty in 2015-2016.[53] Epstein testified that the Curriculum Committee has always been composed predominantly of clinical faculty.

The Curriculum Committee oversees all aspects of the M.D. curriculum.[54] The Curriculum Committee must approve the addition of any courses or clinical rotations and must approve the merger of courses. For example, it has recently created a working group to develop an ultrasound curriculum, and voted to integrate the Pathophysiology and Systemic Pathology courses. The Committee regulates the number of contact hours and lectures students attend per week, and the addition of time to a course would require its approval if that limit were to be exceeded.

Some examples of significant actions taken by the Curriculum Committee in the last few years include changing the maximum length of lectures to 50 minutes, capping total contact time at 25 hours per week with lectures not exceeding 15 hours per week, adding five hours to the Tissue and Organ Biology Course, expanding the hours for the Genetics Course, reducing the hours of the Reproductive Course, approving a new teaching requirement for medical students, and voting to convert to the use of computerized exams.

The Curriculum Committee reviews each existing medical school course every three to four years. Two peer reviewers and sometimes an external reviewer conduct the review,[55] which the full Curriculum Committee then weighs in on. The Committee gives its report to the course director, and Dean Epstein follows up with the course director(s) regarding implementation of the Committee's recommendations, which are usually minor. If a course director does not agree with the Committee's recommendations, some compromise is worked out through a collaborative process 95 percent of the time, but ultimately the Curriculum Committee has authority over the curriculum. One or two

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[52] The Committee also has 18 *ex officio* members. As Dean Epstein is the only *ex officio* member designated as a voting member on a list of current Curriculum Committee members, it appears that the other 17 *ex officio* members, one of whom is basic science faculty member Peter Brodeur, may not vote.

[53] Two other faculty members on the Curriculum Committee, Rebecca Luffler and Jeffrey Marchant, are from basic science departments but are research-track faculty and are not in the petitioned-for unit.

[54] The M.D. curriculum is driven in part by the expertise of the faculty, in part by accreditation standards that dictate the subjects that must be covered, and in part by a national Board exam called Step 1 that fourth-year medical students are required to take in order to graduate.

[55] The University submitted into evidence four course reviews. Basic science faculty in the petitioned-for unit were peer reviewers for only two of them.

meetings per year are devoted to a review of the entire M.D. program, including course ratings, performance on national exams, and residency placements.

In 2009, an ad hoc Educational Strategic Planning (ESP) Committee composed of three working groups, each of which had subgroups, proposed a major revision to the medical school curriculum. The new curriculum eliminated some courses, created some new courses, reduced the amount of time that students engage in coursework before starting their clerkships, and reduced the course length of five to seven courses. The working groups included clinical faculty, basic science faculty, and medical students. Basic science faculty constituted five of the fourteen members of the MedFoundations I subgroup and six of the sixteen members of the MedFoundations II subgroup. Other subgroups had smaller numbers of basic science faculty. A few basic science faculty were opposed to the change. The ESP Committee recommendations were then approved by the Curriculum Committee and accepted by the School of Medicine Executive Council.

The Curriculum Committee determines educational policies such as grading polices. It determines whether each course will be graded on a pass/fail or honors/pass/fail basis, what the threshold grade will be for a passing grade, and whether grading should be on a curve or use a fixed cutoff. It has voted to change the grading criteria used to award points in small group teaching settings.

The School of Medicine Curriculum Committee also votes on approval of new degree programs and sends its recommendation to the University's Board of Trustees.[56]

Dean for Educational Affairs Epstein testified that in his nine years as Dean, neither the Dean of the School of Medicine nor the School of Medicine's Executive Council has ever overruled any of the Curriculum Committee's actions.

School of Medicine Student Ethics and Promotions Committee

The Student Ethics and Promotions Committee is responsible for promoting medical students and for determining the academic consequences to medical students who fail courses. The Committee has 12 voting members who are appointed by the Dean of the School of Medicine. Currently, only two of them are basic science faculty in the petitioned-for unit.[57] The Committee also has six non-voting *ex officio* members.

The Ethics and Promotions Committee votes on the standards that medical students must meet in order to qualify for promotion to the next year, and other

[56] For example, the Committee has voted to approve the MBS program discussed below, a doctorate in public health program, a combined doctorate of dental medicine and master's in public health program, and master's level physician assistant training program.

[57] A third faculty member appointed to a basic science department, Rebecca Luffler, has a research-track appointment and is not included in the petitioned-for bargaining unit.

committees may be involved, as well. Medical students must pass all of their course work in each year in order to be promoted to the next year. For those students who pass all of their courses, the Ethics and Promotions Committee takes a formal vote to promote them to the next year. Any student who fails a Year 1 or Year 2 course, or who receives a failing or "low pass" grade in a clinical rotation, or who fails to pass the national Step 1 Board exam is placed on the Committee's agenda for discussion. The Committee may determine to require students to make up exams, to repeat courses, to repeat clinical rotations, to take a leave of absence, and/or to repeat an entire year. In a very small number of cases, the Committee has voted to dismiss students. No approval from the Dean is required, and the Committee notifies students of its decision by letter.

Dismissed students have the right to appeal the Committee's decision to an Appeals Committee. The Appeals Committee is composed of three senior faculty who do not serve on the Student Ethics and Promotions Committee. For the last several years, at least one of the three has been a basic science faculty member. The Appeals Committee hears from the Student Ethics and Promotions Committee and from the student and then issues its decision on its own, without consulting with Dean Berman or anyone else. Those students who wish to appeal its decision may request a further review by Dean Berman, who has always upheld the decisions of the Student Ethics and Promotions Committee and Appeals Committee.

School of Medicine accreditation process

Medical Schools in the U.S. are accredited by the Liaison Committee on Medical Education (LCME) every eight years. The School of Medicine's M.D. program went through the accreditation process most recently in 2014, and Dean Epstein was responsible for coordinating the effort.

LCME requires medical schools to meet 134 published standards in order to be accredited. Two and a half years before the 2014 process began, the medical school began to build a data base that provided evidence of how it was meeting the standards. A Steering Committee chaired by Dean Berman was created to oversee the accreditation process. Only one of the petitioned-for basic science faculty, David Damassa, was included on the 24-member Steering Committee.[58] Five self-study committees were charged with answering questions by using the database. Their reports were combined into a single self-study report that was sent to LCME three months prior to a site visit. The Self-Study Committee on the Institutional Setting included no basic science faculty members. One of the 18 members of the Self-Study Committee on the Educational Program for the M.D. Degree was a basic science faculty member. One of the sixteen members of the Self-Study Committee on Medical Students was a basic science faculty member. Three of the eighteen members of the Self-Study Committee on Faculty were

[58] Damassa was listed on the Steering Committee membership list as Dean for Information Technology, a position he no longer holds, and Professor of Anatomy. Thus, it is unclear whether Damassa was included on the Steering Committee because of his position as a Dean, a position that is excluded from the petitioned-for unit.

basic science faculty.[59] It appears that there were no petitioned-for basic science faculty on the 16-member Self-Study Committee on Educational Resources.[60]

An LCME survey team came to the School of Medicine for four days in 2014. The survey team met with 100 faculty, of which 20 were basic science faculty. The committee also met with 25 administrators or deans, 40 medical students, six CEOs of affiliated teaching hospitals, ten residents, and Dean Berman. Ultimately, the LCME survey team issued its report accrediting the medical school.

Role of the basic science faculty in the MBS program

Creation of the MBS program

The master's of biomedical science (MBS) program is under the purview of Aviva Must, Dean for Public Health and Professional Degree Programs, who reports to Dean Berman. The MBS program is designed for students who have applied to medical school unsuccessfully or who otherwise wish to strengthen their academic records prior to applying to medical school.

In 2006, the faculty was solicited about ideas to address the financial challenges facing the School of Medicine, in part due to a decline in research funds from NIH. A basic science faculty member came up with the idea to create an MBS program, similar to an MBS program at another Boston university. A working group composed of 16 administrators and faculty, including seven basic science faculty, was established to explore the idea. The working group came up with a proposal for a new master's degree, the MBS. The plan called for basic science faculty to teach in the new program, which would generate tuition money for the School of Medicine. The proposal was shared with and voted on by the School of Medicine's Faculty Senate, Curriculum Committee,[61] and

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[59] Although they are currently among the bargaining-unit employees, two others, Linden Hu and James Schwob, held non-unit positions at the time they served on the committee. Thus, Hu was a clinical faculty member at the time, and Schwob was then the Chair of the Anatomy Department, an excluded position.

[60] Basic science faculty member Eric Frank is listed on the Committee roster as Chair of Molecular Physiology & Pharmacology, an excluded position, and David Damassa is listed again as Dean for Information Technology, an excluded position, and Professor of Anatomy.

[61] The Curriculum Committee for the School of Medicine must approve the creation of any new degree programs at the School of Medicine. Once the MBS program was created, however, a separate MBS Curriculum Committee rather than the School of Medicine Curriculum Committee became responsible for oversight of the MBS curriculum.

Dean Must testified that she is aware of only one instance in which the Curriculum Committee rejected a proposal for a new degree program, which was a master's in pain research, education, and policy. The proposed program was re-crafted in light of the Curriculum Committee's objections and was ultimately approved.

Executive Council, and by the entire faculty, including clinical and basic science faculty, all of which voted in favor of creating the new degree program. The creation of new degree programs must be approved at the University level by the Provost, the Academic Affairs Subcommittee of the University's Board of Trustees, and the full Board of Trustees, all of which ultimately approved it, as well.[62]

The MBS enrolled its first class in August 2007. It now has 130 students and generates $5.6 million in tuition and about $200,000 in fees each year for the School of Medicine.

Operation of the MBS program

The MBS program is headed by Program Director Alvar Gustafson and Associate Director John Castellot, both of whom are basic science faculty members. Unlike the Sackler School, which has a special appointment process, any faculty member of the School of Medicine is eligible to teach in the MBS program. About 40 basic science faculty perform work for the MBS program as advisors, lecturers, course directors, and thesis mentors.[63]

The MBS courses are the same as those taught to first-year medical students, and the lecturers are usually the same lecturers who deliver the M.D. courses.[64] Each MBS course has a course director who is responsible for the delivery of all elements of the course. Course directors may call on other faculty with expertise in a given area to provide some of the lectures. Some give most of the lectures themselves and others do very little of the actual lecturing. Course directors are responsible for creating and grading exams and for interacting with students who are having problems.[65]

In addition to completing those courses, MBS students are also required to write a thesis, which may be a literature review or a laboratory thesis, for which they are usually mentored by a basic science faculty member.[66] Further, each student is paired with an advisor, called an academic partner, who provides intensive advising with respect to strategy in applying to medical school.

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[62] The School of Medicine's former Dean wrote a memorandum to the Academic Affairs Committee urging approval of the MBS program.

[63] Two of the required courses and some elective courses are taught by non-basic science faculty, some of who may be adjuncts.

[64] Although they take the same courses, MBS and medical students do not attend class together. Both groups use the same course management software and may watch any class by means of a video.

[65] As noted above, SEIU seeks to include those course directors who are basic science faculty.

[66] MBS Associate Director Castellot oversees the thesis aspect of the MBS program.

Role of basic science faculty in MBS committees

The MBS program receives about 800 to 900 applications, from which an admissions committee accepts about 200 applicants for a class of about 130. The program seeks to admit students who are likely to be admitted to medical school, as the success of the program hinges on its success rate in getting MBS students into medical school.

The MBS Admissions Committee is composed of four basic science faculty who are voting members and one non-voting member, the Director of Admissions for the Public Health and Professional Degree Programs.[67] As the chair of the committee, basic science faculty member Peter Brodeur identifies those applicants who should clearly be admitted and those who should clearly be rejected. Those applicants who fall somewhere in the middle are assigned for review to two admissions committee members. If both reviewers agreed to accept or reject an applicant, their decision is final. The full committee discusses those applicants over whom there is a split decision or any applicants that the two reviewers would like to discuss with the full committee. The decisions of the MBS admissions committee are not reviewed by any other bodies at the School of Medicine.

The School of Medicine offers scholarships to the MBS program, the number of which is determined by an administrator based on budgetary considerations.[68] The MBS Admissions Committee recommends candidates for the scholarships to a Public Health and Professional Degree Program scholarship committee. The recommendation of the MBS Admissions Committee concerning scholarship recipients has never been rejected.

The MBS Curriculum Committee is composed of six basic science faculty,[69] one program manager, and two MBS student representatives. In 2015, the MBS Curriculum Committee revised its policy concerning rounding up grades and established a new system of grade cut-offs, i.e., the numerical grade needed to earn each letter grade. That same year the Curriculum Committee voted unanimously to adopt the use of certain exam software that the M.D. program had adopted, instead of using handwritten tests.

The Curriculum Committee also approves the creation of new elective courses for the program.[70] A faculty member who wishes to teach a new course presents a proposal

[67] The MBS admissions committee is distinct from the admissions committee for the M.D. program.

[68] Currently, the School of Medicine offers two half scholarships to the MBS program.

[69] Although Dean Must testified that one of the six, Robert Wilson, is a basic science faculty member, his name does not appear on a list of petitioned-for basic science faculty members that was submitted into evidence.

[70] The MBS curriculum for the fall is identical to that for medical students, but the elective courses offered in the spring are different.

with a draft syllabus for review by the Committee, which votes to accept or reject the proposal or asks for changes to the proposal. Thus, in the fall of 2015, the MBS Curriculum Committee approved Professor Karina Meiri's proposal to teach a one-credit elective called Intro to Clinical Neuroscience. Neither Dean Must nor anyone in the School of Medicine administration plays a role in approving these policy changes or new courses.

The MBS Program is overseen by a Steering Committee that is composed of nine members, including four basic science faculty, one of whom, Alvar Gustafson, is the chair.[71] The Steering Committee receives updates from the Admissions and Curriculum Committees, although it does not approve their decisions. The role of the Steering Committee is to make sure that the MBS program is run pursuant to its policies. It monitors changes in the M.D. program and their impact on the MBS program. It has addressed issues such as diversity in the MBS program, thesis issues, and changes in financial aid regulations that impact students who fail a course. Dean Must testified that the Steering Committee decides how many students will be admitted to the MBS program, currently capped at 130, but she did not know if the administration of the School of Medicine would have to be involved in any decision to increase or decrease enrollment and testified that a Steering Committee recommendation to increase or decrease enrollment would not automatically be implemented.

Tuition for the MBS program is set by School of Medicine administrators rather than by the MBS program. The MBS budget is not subject to a vote by the faculty.[72]

Role of basic science faculty in the Faculty Grievance Committee

The Faculty Grievance Committee is one of the standing committees of the School of Medicine. Three of the current seven members of the Grievance Committee are basic science faculty.

The Faculty Grievance Committee recommends changes to the faculty grievance procedures to the Executive Council and Faculty Senate. The Committee also elects formal hearing boards from among its members upon receipt of a faculty grievance.[73] After a hearing, the hearing board reports its findings to the President of the University.

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[71] Four of the Steering Committee members are deans, including Dean Must. This committee takes few votes, and Dean Must was unsure whether the ninth member, Program Manager Vivian Stephens-Hicks, is a voting member.

[72] The budget for the MBS program is developed by the program director, Alvar Gustafson and the associate dean for Public Health and Professional Degree Programs, reviewed by the School of Medicine's Executive Associate Dean, and presented to the central administration for the University.

[73] The grievance procedure does not apply to grievances concerned with substantive matters of professional competence or worthiness for appointment, promotions, tenure, or retention of a faculty member.

The grievance procedure provides that the President shall base his decision on the hearing board's record, including the finding of the hearing board, and he may seek the advice of any other university officials. At his discretion, the President may remand the grievance to the hearing board for further evidence and/or reconsider their findings, in which case the hearing board shall promptly take further evidence and/or reconsider their findings and issue a second report. The record contains no specific examples of any grievances considered by a hearing board.

Role of basic science faculty in ad hoc committees at the School of Medicine

Reorganization of basic science departments

In 2009, the former Dean of the School of Medicine, Dean Rosenblatt, requested that an ad hoc committee consider the organizational structure of what were then seven basic science departments, in order to maximize research productivity and produce financial savings. Dean Rosenberg convened a committee composed of three basic science chairs and an unspecified number of basic science faculty who were elected to represent their departments. A majority of the committee recommended no change in department structure, while a minority report recommended reorganization. Dean Rosenblatt accepted the majority report and took no action.

At some point after that, Dean Berman notified the faculty of his decision to dissolve one of the basic science departments, the Pharmacology Department, and he removed the Pharmacology Department chairs. Dean Berman made this decision unilaterally and without consulting the faculty.

In 2012, Dean Berman established an ad hoc Research Vision Committee (RVC) to explore reorganization again. Dean Berman charged the RVC with developing a plan to reduce the number of basic science departments, on the ground that sustaining six strong basic science departments was not possible in light of limited resources. The 12-person committee included three basic science department chairs and two basic science faculty.[74] In its report, the RVC presented a three-department model and a four-department model as options. After the RVC issued its report, Dean Berman and Dean Rosenberg met with the faculty several times to obtain their input, although the faculty as a whole was not a deliberative body in the process. Dean Berman also gave the Faculty Senate the opportunity to propose an alternate model, but the Faculty Senate ultimately declined to present an alternate plan. At that point, Dean Berman selected the four-department model and submitted his proposal to the University's Board of Trustees, which approved it.

As a result of the reorganization, two of the six previous departments remained as before, four departments were dissolved, and two new departments were created:

[74] Professor Gail Sonenshein, who was also a Committee member, works within a basic science department but is not included in the petitioned-for unit because she is neither tenured nor tenure-track.

Developmental Molecular and Chemical Biology; and Integrative Physiology and Pathobiology. All faculty were asked to identify which of the four new departments they wished to affiliate with, and all faculty choices were honored.

On January 11, 2013, the chair and vice-chairs of the Faculty Senate wrote a letter to Dean Berman about the reorganization, as follows:

> An issue of great concern to the faculty is the process by which these plans will be evaluated. You described in your last letter to the faculty the role that senior administration will play in the process. However, there did not seem to be any role for faculty in these deliberations other than department chairs. We would like to suggest that you follow the path exemplified by the FAC [Faculty Advisory Committee] committee that has advised you on several important issues in the past. Perhaps current FAC members (non-chairs), or members of the Faculty Senate sub-committee would be appropriate to represent the faculty in this process.

On January 14, 2013, Dean Berman replied, in relevant part:

> Of course, faculty preferences will be taken into account in decision making, as will the plans' adherence to the criteria distributed in the recent email to all faculty. In the end, though, the dean, president and provost are the ultimate decision makers for all serious matters affecting the school's and university's future. In this case, the Vice Dean for Research, Naomi Rosenberg, will be added to that list. That said, faculty feedback is a very important consideration in this decision, and is welcome.

Creation of the Division of Medical Education

In 2012, Dean Berman established an Advisory Committee to make recommendations about the creation of a new Department of Medical Education that would serve as a home for faculty members whose primary responsibility is to teach medical students, MBS students, and others training in medical fields. The Advisory Committee of 13 was composed of deans, associate deans, clinical faculty, and basic science faculty, of which three to four were in the petitioned-for unit.

In the end, the Committee modified the Dean's proposal by recommending the creation of a Division of Medical Education to be housed within one of the basic science departments and by recommending that the Division not be structured to support clinical faculty. The Dean accepted the Advisory Committee's proposal, which was implemented in 2013.

Tufts Innovation Institute

The minutes of a March 2014 Faculty Senate meeting reflect that an ad hoc Faculty Advisory Committee (FAC) had given advice to the Provost about how a new

Tufts Innovation Institute (TII) that was being established should be governed, and the FAC nominated some individuals for a TII Steering Committee. The FAC reported to the Faculty Senate that, while the steering committee had been created, the TII had chosen proposals to fund and asked certain faculty to move, without having a business plan and without holding a meeting of the steering committee, counter to FAC recommendations.

Compensation Committee

Basic science faculty are eligible for an annual salary increase only if their grant support is at a certain threshold level. In 2008, the basic science department chairs established a policy under which the salaries of tenured faculty may be reduced if their support from grants falls below a certain threshold.[75] Almost all of the basic faculty filed a petition with the Dean of the School of Medicine, the Provost, and the President of the University, asking for the rescission of the 2008 salary modification policy. The petition was rejected, and the policy went into effect over the objection of the faculty. Since then, there have been 16 cases in which a salary reduction was considered. The policy gives affected faculty the right to appeal to a committee of department chairs, who make a recommendation to Dean Berman, the ultimate decision-maker. The salaries of about 11 basic science faculty have been modified pursuant to this policy.

NIH funding has been decreasing over the years, creating financial pressure for medical research institutions such as the School of Medicine, which has been trying to decrease costs and increase revenue from other sources. One of the main drivers of cost to the School of Medicine's budget is the gap funding, i.e., guaranteed salary, provided to basic science faculty during the hiatus between grants. About a year ago, Dean Berman created an ad hoc committee to come up with a proposal for a new compensation plan for his consideration. The Compensations Committee is composed of ten individuals, five of whom are in the petitioned-for basic science faculty unit. The Committee's charge is to create a compensation plan that incentivizes faculty to obtain more research dollars by giving them the opportunity to increase their compensation if they do so.[76] The Committee had not yet submitted its proposal as of the date of the hearing, but the Dean was ultimately to bring a proposal to the University's Board of Trustees.

Role of the basic science faculty in the budget process

[75] In order to be eligible for a raise, faculty must obtain grants to cover at least 40 percent of their salary, up to a certain cap set by NIH. Faculty whose grants cover less than 15 percent of their salary on average over three years may be subject to a one-time 25 percent reduction in pay, but their salary will be no lower than the salary level of faculty of the same rank in the undergraduate Department of Biology.

[76] Such a policy appears to be in place already, to some degree. The appointment letters for two basic science faculty indicate that they will receive a bonus if they achieve extramural funding that supports at least 70 percent of their salaries.

The School of Medicine's proposed budget does not go to the Faculty Senate for approval, and there is no evidence of any involvement by the basic science faculty in the budget process. Nor do basic science faculty play any role in determining tuition increases.[77]

Conclusion re managerial status

The Board's standard for analyzing the managerial status of faculty

In *Pacific Lutheran University*, 361 NLRB No. 157 (2014), the Board refined the standard by which it determines the managerial status of faculty pursuant to the Supreme Court's decision in *Yeshiva University*, 444 U.S. 672 (1980). The Board determined to examine the breadth of the faculty's authority, giving more weight to those areas of policy making that affect the university as a whole, such as the product produced, the terms on which it is offered, and the customers served. It organized the review of the breadth of faculty decision-making into five general areas, denoting them as either primary, i.e., more important, as they affect the University as a whole, or secondary, i.e., less important. *Pacific Lutheran University*, supra, slip op. at 16-17.

The three primary areas of decision making to be considered are decision making over academic programs, enrollment management, and finances. Academic programs covers topics such as the university's curricular, research, major, minor, and certificate offerings and the requirements to successfully complete those offerings. Enrollment management dictates the size, scope, and make-up of the university's student body. Finances concerns the power to control or make effective recommendations regarding financial decisions, both income and expenditures. The Board noted that financial decisions have broad effects across a university and are not localized in a professor's classroom or lab, and encompass matters such as net tuition (tuition less financial assistance) *Id.*, slip op. at 17.

The two secondary areas of decision making to be evaluated are academic policy and personnel policy and decisions. Academic policy covers topics such as teaching/research methods, academic integrity policy, syllabus policy, research policy, and course content policy. Personnel policy and decision includes faculty control over personnel policy, including hiring, promotion, tenure, leave, and dismissal. *Id.*, slip op. at 17-18.

In determining managerial status, the Board will also examine the depth of the faculty's authority, i.e., whether the faculty actually exercise control or make effective

[77] Department chairs submit draft budgets for their department to the School of Medicine's Executive Associate Dean Tom Malone, who is the chief financial officer for the School, which go to the University Budget and Finance Office and the Dean of the School of Medicine.

After discussing tuition increases with the Dean of Students and Assistant Dean for Financial Aid, Executive Associate Dean Malone makes a recommendation to Dean Berman. All school budgets and tuition increases are ultimately approved by the University's Board of Trustees.

recommendations over those areas of policy. Thus, the party asserting managerial status must demonstrate that the faculty actually exercise control or make effective recommendations, and it must prove actual – rather than mere paper – authority. The Board emphasized the need for specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that the decisions or recommendations are generally followed. To be "effective," recommendations must be almost always followed by the administration. Further, faculty recommendations are "effective" if they routinely become operative without independent review by the administration. *Id.*, slip op. at 18.

Finally, an evaluation of whether faculty actually exercise control or make effective recommendations requires an inquiry into both the structure of the university decision making and where the faculty at issue fit within that structure, including the nature of the employment relationship held by such faculty (e.g., tenured vs. tenure eligible vs. nontenure eligible; regular vs. contingent). *Id.*, slip op. at 19.

Calculation of majority status on committees

In *Pacific Lutheran University*, the Board held that, in those instances where a committee controls or effectively recommends action in a particular decision making area, the party asserting that the faculty are managers must prove that a majority of the committee or assembly is faculty. If faculty members do not exert majority control, the Board will not attribute the committee's conduct to the faculty. *Id.*, slip op. at 18 and fn. 36.

Here, there are numerous committees on which the faculty as a whole, counting basic science faculty, research-track faculty, and clinical faculty, constitute a majority of the committee, but basic science faculty, standing alone, constitute a minority of the committee. The University contends that any number comparison of committee members should be centered on faculty versus administrators rather than petitioned-for faculty versus other types of faculty. It argues that, if a committee is controlled by faculty rather than by administrators, then every one of its faculty members, regardless of type, functions in a managerial capacity. It asserts that this is especially true here, because the clinical faculty are not even employees of the University but, rather employees of affiliated hospitals and health centers, and consequently they themselves cannot be deemed managerial. Thus, the University argues, the basic science faculty are the only faculty who can be said to have managerial control. Finally, the University asserts that, because there are no restrictions on how many basic science faculty can run for positions on these committees, there could be many more of them if they chose to run.

Although it appears that the Board has never explicitly addressed this issue, in *Cooper Union of Science and Art*, 273 NLRB 1768, 1769-1770, 1775, the Board considered the managerial status of full-time faculty who served on various committees. The Board noted that, in the Schools of Art and Architecture, full-time faculty members

constituted both a numerical and a voting minority on the administrative committees, sharing seats with administrators, students and adjunct faculty members. Thus, in calculating whether the unit faculty constituted a majority or minority of each committee, the Board counted the number of petitioned-for faculty versus all other committee members, including adjunct faculty. See also, *Lewis University*, 265 NLRB 1239, 1247 (only one of two faculty members on the Student Union Advisory Board is in the bargaining unit).

I reject as speculative the argument the argument that more basic science faculty may serve on committees if they so choose. Further, the clinical faculty will necessarily always predominate on those committees that govern matters related to the M.D. program, because the basic science faculty teach a relatively small number of the medical school courses.

Accordingly, in calculating the majority status of basic science faculty on the various University committees in which they participate, I shall deem the basic science faculty to control a committee only if the basic science faculty members, standing alone, constitute a majority of the committee members.

Application of the *Pacific Lutheran University* standard

I find that the authority of the basic science faculty in the five decision-making categories set forth in *Pacific Lutheran University* is sufficient in breadth and depth to support a determination that they are managerial employees.

With respect to decision-making over academic programs, a primary area, the Sackler School Programs and Faculty Committee and Sackler School Executive Council, both of which are dominated by basic science faculty, have significant authority. They have the power to approve new combined degree programs and to merge degree programs, without approval at the University level. Thus, those bodies approved a new M.D./M.S. program in Clinical Translational Science and the merger of three programs into a new Cell, Molecular, and Developmental Biology Program. Those same bodies must also approve all new courses at the Sackler School, and there is no evidence that further approval is required. The Sackler School Executive Council also approves the list of all degree candidates. Similarly, the Curriculum Committee for the MBS program, which is dominated by basic science faculty, approves the creation of all new elective courses for the program, without the need for further approval.[78]

[78] In concluding that basic science faculty have managerial authority with respect to academic programs, I do not rely on their role in the following decision-making areas, either because the basic science faculty are or were a minority on the relevant committees or because the University failed to establish that their recommendations were implemented without independent review by higher authorities: approval of new degree-granting programs by the Sackler Programs and Faculty Committee and Executive Council, creation of the new MBS program, all actions of the Curriculum Committee for the M.D. program, the reorganization of the basic science departments, the creation of the Division of Medical Education, and the accreditation process for the M.D. program. I also do not rely on the role of the basic science faculty in conducting

In the area of enrollment management, another primary area, the basic science faculty play a more limited role. There is no evidence that basic science faculty play a role in determining the size of student enrollment.[79] They do, however, play a role in admissions policy at the Sackler School, in that each program, most of which are dominated by basic science faculty, determines how to handle the admissions process. The Sackler School Executive Council, which is dominated by basic science faculty, voted to change the application deadline for fall 2016.[80]

In *Pacific Lutheran University*, the Board did not specify whether faculty control over individual admissions decisions, as opposed to control over admissions policy, constitutes evidence of managerial status, and there is conflicting Board law concerning this issue. Thus, in *Cooper Union of Science and Art*, supra at 1775, the Board held that the admission of individual applicants does not rise to the level of a managerial function. In later cases, however, the Board considered control over the admission of individual applicants to be at least some evidence of managerial status. *American International College*, 282 NRLB 189, 201 (1986) (faculty who have played a more active role in selecting particular candidates for admission are managerial); *St. Thomas Uni*versity, 298 NLRB 280, 286 (1990) (citing *Yeshiva University* for the proposition that making final decisions regarding the admission, expulsion, and graduation of individual students is managerial); *Elmira College*, 309 NLRB 842, 849 (1992) (faculty are managerial where they participate in a committee that both sets the standard for automatic acceptance of applicants and reviews all questionable applicants for admission and makes effective recommendations concerning the admission of a majority of those applicants).

In accord with these later cases, I shall consider evidence of faculty control over the admission of individual students to be some evidence of managerial status. Thus, basic science faculty are responsible for making all admissions decisions to Sackler School programs, and their decisions are overturned by Dean Rosenberg only very rarely, for limited reasons. Basic science faculty at the Sackler School also determine which students will rotate through their labs and which students to accept into their labs for their thesis work. The MBS Admission Committee, with voting members composed

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program reviews at the Sackler School, in the absence of evidence that their recommendations are routinely followed.

[79] Dean Rosenberg determines the number of graduate students to be admitted to the Sackler School, and she sometimes accepts and sometimes rejects the requests of the basic science faculty to increase the number of students. The Dean of Admissions determines the number of offers to be made to medical school applicants. The basic science faculty constitute only a minority of the MBS Steering Committee, which recommends how many students will be admitted to the MBS program, and its recommendations would not automatically be implemented.

[80] In concluding that the basic science faculty are managerial, I do not rely on their role in approving new pre-medical requirements for applicants to the M.D. program or on their role in approving the evaluation form for medical school interviews, as the basic science faculty were a minority on the Admissions Committee, which voted to approve both measures.

exclusively of basic science faculty, make all admissions decisions for the MBS program, and their decisions are not reviewed.[81]

Basic science faculty also have significant decision-making authority over financial matters, the third primary area. Thus, they have complete discretion with respect to the expenditure of millions of dollars in start-up funding and bridge funding that they receive from the University and from grantors to fund their labs. While SEIU argues that spending authority that is "localized within a professor's classroom or lab" does not confer managerial status under *Pacific Lutheran University*, the basic science faculty are authorized to spend large sums of money on expensive equipment that is shared by faculty outside their own labs. Further, they are expected to obtain grants to fund their labs that ultimately bring in millions of dollars to the University in the form of indirect recovery costs, money that impacts the School of Medicine's budget well beyond the confines of their individual labs.

On a smaller scale, the Sackler School Executive Council, which is dominated by basic science faculty, votes on the amount of the annual stipend paid to Sackler graduate students, and the Council's recommendation has always been followed by Dean Rosenberg. Sackler School program directors are given a budget to use at their discretion to recruit prospective students and to fund seminars and retreats. Finally, the MBS Admissions Committee, which is dominated by basic science faculty, recommends candidates for scholarships, and its recommendations have never been rejected by the Public Health and Professional Degree Program Scholarship Committee.[82]

With respect to decision making over academic policies, a secondary area, the Sackler School Executive Council, which is dominated by basic science faculty, approves academic policies at the Sackler School, such as credit for prior courses, lab rotation requirements, and thesis committee requirements. The MBS Curriculum Committee, on

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[81] I decline to rely on the role of the basic science faculty on the Admissions Committee for the M.D. program, where only two of the current 77 members are basic science faculty, and each applicant needs the vote of at least 80 percent of the vote cast at admissions meetings attended by 25-45 members in order to be admitted. Nor do I rely on their role in admissions to the M.D./Ph.D. program, where the record reveals that the majority of interviewers are basic science faculty but there is no record evidence of the decision-making process used after the interviews.

[82] I find no merit in the University's contention that the role of the basic science faculty in the creation of the MBS program, which generates $5.8 million for the School of Medicine each year, demonstrates their managerial authority in financial matters. While a basic science faculty member came up with the idea for the program, the new degree had to be approved by numerous bodies on which basic science faculty either constituted a minority or had no members. Nor do I rely on the role of the Faculty Senate in budget matters, as its role is limited to receiving financial information and suggesting budget priorities and, in any event, its basic science representation is limited to 25 percent.

which basic science faculty constitute a majority, has revised the grading policy for the MBS program and voted to adopt the use of computerized exam software.[83]

Basic science faculty also play an important role in the secondary area of personnel policy and decisions. Thus, tenured faculty vote to approve all promotion and tenure decisions within their own departments, and the department chairs have always supported their recommendations. At the next step in the process, the Basic Science Faculty Appointment, Promotion and Tenure Committee, composed almost entirely of basic science faculty, must approve all promotion and tenure applications, and its recommendations are almost always followed. Thus, since 2003, the Dean has followed the Committee's recommendations 27 of 29 times and the Provost has rejected only one of its recommendations. Further, as discussed below, basic science faculty possess Section 2(11) authority to hire the employees who work in their own labs.[84]

Finally, *Pacific Lutheran University* requires consideration of the structure of the University's administration and the nature of the faculty's employment relationship. While noting that the *Yeshiva* Court acknowledged the possibility that a rational line could be drawn between tenured and untenured faculty members in determining managerial status, the Board declined to draw such a line. *Pacific Lutheran University*, supra at 19, p. fn. 40. However, in finding that contingent faculty were not managerial in *Pacific Lutheran University*, the Board noted that many standing committees excluded them because of their contingent status, and their ability to control or make effective recommendations regarding university policy was inherently limited by the contingent nature of their employment, which was subject to yearly renewal. Here, the petitioned-for faculty play an important role in governance at the Sackler School and in the MBS program, where they participate in and, in fact, constitute the majority of members in many important committees that determine or implement School of Medicine policies. Further, they are all either tenured or tenure-track with three-year appointments, and the long-term nature of their employment relationship gives them a stronger voice in academic affairs than that of contingent faculty. Thus, although not dispositive, I find

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[83] In concluding that basic science faculty have managerial authority in the area of academic policy, I do not rely on their role on either the Curriculum Committee or the Student Ethics and Promotions Committee for the M.D. program, due to their minority status on those committees.

[84] I do not rely on the role of basic science faculty in the selection of new faculty hires or in the approval of three- and six-year contract renewals, as the record is silent as to whether or not the faculty's recommendations in those areas are generally followed. Nor do I rely on their role in the appointment of new hires to the Sackler School, which appears to be a ministerial act, as appointment to the Sackler School is an expectation that seems to be assumed by the decision to hire, and no basic science faculty member's nomination to the Sackler School has ever failed. Finally, the role of the basic science faculty on the Faculty Grievance Committee and the 2015 Compensation Committee does not support a finding of managerial status, as they do not dominate either committee, and it is too soon to know whether the recommendation that the Compensation Committee ultimately makes will be followed.

that the fact that the petitioned-for faculty are tenured or tenure-track weighs in favor of a finding of managerial status.[85]

In sum, I conclude that the breadth and depth of the basic science faculty's authority in the areas of academic programs, enrollment management, finances, academic policy, and personnel policy, coupled with their status as tenured and tenure-track faculty, supports a finding that they are all managerial.

SUPERVISORY STATUS OF THE BASIC SCIENCE FACULTY

Sixty-seven of the seventy petitioned-for basic science faculty operate their own labs.[86] All faculty whose work is supported by grants may hire personnel for their labs, although they are not required to do so, and they determine the number of people to be hired. Of the 67 basic science faculty with labs, 41 of them currently have direct reports who work in their labs, including research assistant professors, senior research associates, research associates, postdoctoral scholars, program directors, senior research technicians, research technicians (also referred to as lab technicians or lab assistants), and lab managers.[87] One basic science faculty member has 18 direct reports in his lab, while the rest have between one and seven direct reports.

Twenty-six of the basic science faculty with labs currently have no direct reports. Of those, 19 have had direct reports in their lab at some point between 2010 and 2015, while 7 have never had direct reports in their labs during those years.

Dean Rosenberg testified that, with two exceptions, all of the individuals who work in the labs are employees of the University. They are typically paid with money from research grants or faculty start-up funds, and their appointments end if the grant supporting their work ends. As described above, if there is a lapse in grant funding, the

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[85] I find unpersuasive SEIU's contention that the Dean's Leadership Team, department chairs, and other administrative professionals provide a substantial administrative buffer between the faculty and the Dean that reduces the involvement of the faculty in the development and implementation of policies at the School of Medicine. There was no record evidence about what the Dean's Leadership Team does, and the existence of these administrators does not detract from the authority possessed by the basic science faculty as outlined above.

[86] Two of seventy petitioned-for faculty, David Damassa and Stanley Jacobsen, do not have research labs. In addition, one newly-hired basic science faculty member, Malavika Raman, had not yet arrived on campus as of the hearing, and the record does not reveal whether she will have a lab.

Two additional basic science faculty, Peter Brodeur, and Alvar Gustafson, do not have research labs. As set forth above, the Union seeks to exclude Brodeur and Gustafson from the unit.

[87] As noted above, many of the basic science faculty also have graduate students working in their labs, but no party contends that the graduate students are employees.

School of Medicine sometimes provides bridge funding to allow faculty to continue their research during the hiatus between grants.

As noted above, research assistant professors are non-tenure track employees who conduct research in the lab of a basic science faculty member and who sometimes have their own grant funding. Senior research associates and research associates also conduct research. Postdoctoral scholars (postdocs) are individuals who have a Ph.D. and seek additional training to prepare for an independent career in academia or the biomedical or pharmaceutical workforce. They typically spend three to five years conducting research in a lab as postdocs, after which some are appointed as research associates. Senior research technicians and research technicians typically have a bachelor's degree in biology or a related science. They assist postdocs and graduate students in conducting their experiments, performing tasks such as maintaining mouse colonies used in research, making sure that equipment functions properly, and making reagents commonly used in labs.

Hiring lab employees and setting their compensation[88]

Basic science faculty hire research technicians, senior research technicians, and lab managers with the assistance of the University Human Resources Department.[89] For example, the 2013 appointment letter for Assistant Professor Marta Gaglia stated that her start-up funds "will also support the full salary and benefits of a research technician for three years, if you choose to hire one. " The faculty member develops a job description. The Human Resources Department posts the position and may prescreen applicants if the faculty member chooses. The Human Resources Department refers resumes to the hiring faculty member, who decides who to interview, interviews candidates, and identifies who will be hired. Faculty members must demonstrate to the University that funds are available to support the position, but no other approval is required. Human Resources issues the formal hiring offer and handles the "onboarding" process. With respect to setting the salary for new hires, Human Resources has guidelines to ensure fairness among employees within the same classification, although there are bands within each classification and some discretion. In the case of research technicians, the basic science faculty member determines whether to hire at the research technician level or at the senior research technician level, which is a higher-paid position.

Basic science faculty typically hire postdocs without the assistance of the University's Human Resources Department. The jobs are rarely posted, and postdocs

[88] The University's evidence with respect to the authority of basic science faculty to hire and set the compensation of lab employees consisted of the testimony of Dean Rosenberg and documentary evidence, including a list of the names and titles of the employees who work in each lab.

[89] The Human Resources function is now provided by the University rather than by the School of Medicine, and non-faculty employees such as lab employees, are covered by a University-wide employee handbook.

generally obtain their positions by e-mailing faculty members, meeting them at a scientific meeting, or obtaining referrals from a colleague. After an interview or visit, faculty members send an offer letter. The National Institute for Health (NIH), which funds many of the basic science faculty grants, establishes a minimum salary for postdocs. When hiring postdocs, faculty may set their compensation above but not below that minimum.[90] In two offer letters to postdocs that were submitted into evidence, one faculty member also offered to provide a certain amount of money toward the postdoc's relocation costs, while the other faculty member offered no relocation assistance.

The process for hiring research assistant professors resembles that for postdocs, in that candidates typically e-mail an inquiry to basic science faculty or meet them at a scientific meeting. In some cases, basic science faculty offer this position to individuals already working in their labs in a lesser position. The offer letters for research assistant professors are issued by the Dean of the School of Medicine and the chair of the relevant department. Basic science faculty set the compensation level for research assistant professors and research associates; the University has no standard or recommended rates for such positions.

Evaluating lab employees and determining merit raises

Faculty complete annual reviews of the employees in their labs, in which they rate each employee in one of four performance categories: "consistently exceeds expectations," "successfully meets expectations," "meets some expectations," and "did not meet expectations." Each year, the University issues a merit increase process document that establishes a merit pool aggregate amount. For example, the aggregate amount available for merit increases in 2015 was 2.2 percent. The merit increase process issued by the University also includes guidelines setting forth the percentage of employees who should fall within each of the four performance categories, the increase range for each performance category, and suggested increase percentages for each category. For example, the guideline for 2015 noted that 15 percent of employees should receive a rating of consistently exceeds expectations, the range for that rating is 2.1 percent to 2.5 percent, and an employee in this category will generally receive a merit increase of about 2.3 percent.

Dean Rosenberg testified that basic science faculty recommend an increase within the specified ranges for each category and that their decisions about the amount of merit increases are not reviewed by anyone else. The School of Medicine's Executive Associate Dean, Tom Malone, testified that each department's department manager submits a spreadsheet to him that shows the rating and the amount of the merit increase for each person in the department, but he has no personal knowledge about how a number within the range is designated for each employee. He does not receive the performance reviews. He does not review or change the amount of the merit increases, although if he saw a raise that exceeded the recommended range, he would ask the department manager

[90] A Tufts University Postdoctoral Handbook states that the "Advisor," i.e., the basic science faculty member, will determine compensation levels for postdoctoral scholars.

if it was correct. Malone then sends the spreadsheet to the University's Human Resources Department.

The University submitted into evidence two reviews for postdocs and one review for a senior research technician, performed in 2014 and 2015. The performance category options for the postdoc reviews, were "excellent," "satisfactory," and "unsatisfactory." Rosenberg testified that there is no difference for purposes of merit increases between these categories and those set forth in the merit increase process document and that if a faculty member checked the "satisfactory" box, it would be at the faculty member's discretion to choose between the intermediate choices of "successfully meets expectations" and "meets some expectations." The two postdocs received a "satisfactory" rating, and the senior research technician received a "consistently meets expectations" rating, but the record does not reveal the percentage merit increase awarded to any of the three employees.

Discipline of lab employees

Dean Rosenberg testified that basic science faculty have the right to discipline or to recommend the discipline of lab employees. No documentary evidence of the discipline or discharge of any lab employee was submitted into evidence.

Dean Rosenberg testified about one instance in 2011 when former faculty member Linc Sonnenschein discharged postdoc scholar Ky Chen, the only example of discipline or discharge of which she had first-hand knowledge. Chen was terminated for inappropriate record keeping of research data. After warnings and mediation had failed to correct the deficiency, Sonnenschein worked with Rosenberg and the Human Resources Department to effectuate the termination. Rosenberg testified that it was Sonnenschein's decision, not hers, to terminate Chen. Rosenberg testified that Human Resources asked for her assessment as a scientist as to whether lab record keeping was a reasonable expectation for a postdoc in a lab, but she was not asked for a recommendation as to how she would handle the situation. She testified that the role of Human Resources in such situations is to make sure that the law is followed in discharge situations, not to make the discharge decision. No documentary evidence of Chen's discharge or his prior warnings was submitted into evidence.

Assignment and direction of the work of lab employees

Dean Rosenberg testified generally that faculty members assign work and oversee and direct the work of their lab employees, with some variation based on the style of the faculty member and the level of training of the employee. The research assistant professors would be granted the most independence and the lab technicians the least independence. When Dean Rosenberg ran her own lab, which she has not done in many years, she would meet with employees to discuss the outline of experiments and strategy. Depending on the level of the employees, there might be an extensive discussion of the relevant scientific literature, the experimental protocol, the number of samples to be used, the number of controls to be included, the timeline, and how the data should be presented.

Dean Rosenberg does not oversee the day-to-day operation of the labs now and does not know how the work in each lab is assigned.

Dean Rosenberg testified that lab employees go to the faculty member if they need time off or need to leave early for the day, while Human Resources would be involved in matters such as medical leave or parental leave. There is no record evidence of any specific requests for time off handled by a faculty member.

Dean Rosenberg testified that basic science faculty are supposed to spend 60 percent of their time engaged in research, which includes supervising the employees in their labs. She estimated that about 50 percent of their 60 percent research time is spent supervising and interacting with the lab employees (excluding graduate students) who conduct the research work. This estimate was based on her own experience and that of faculty she has known, although Dean Rosenberg could not say how much time individual faculty spend physically in their labs. Some basic science faculty choose to physically work along with their lab employees doing experiments, while others delegate the experiments to their employees, but they oversee and direct the work regardless.

Conclusion re supervisory status

The Board's standard for analyzing supervisory status

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.,* 273 NLRB 1677, 1689 (1985). In order to confer Section 2(11) status, the authority must be held in the interest of the employer. *G4S Government Solutions, Inc.*, 363 NLRB No. 113 (2016); *Oakwood Healthcare*, 348 NLRB 686, 687 (2006).

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001). The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*, 175 NLRB 871 (1969). The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992).

Analysis

Possession of statutory authority

I find that the University has failed to establish that the basic science faculty have statutory authority to assign and direct employees, to discipline them, or to reward them. The University's evidence with respect to the authority of the basic science faculty to assign and direct, based solely on Dr. Rosenberg's testimony about the way she ran her own lab years ago, is insufficient to demonstrate the authority of the current basic science faculty in this area. The University has also failed to demonstrate that basic science faculty have authority to discipline or recommend the discipline of lab employees. In this regard, there is no documentary evidence of any instance in which basic science faculty disciplined or recommended the discipline of a lab employee. Even if there were documentary evidence to demonstrate that former basic science faculty member Linc Sonnenschein terminated postdoc scholar Ky Chen in 2011, one incident several years ago is too isolated to form the basis for a finding of supervisory status.

Nor does the role of the basic science faculty in evaluating lab employees demonstrate their authority to reward employees. While authority to evaluate is not one of the Section 2(11) indicia supervisory status, the Board has held that individuals are supervisors where there is a direct correlation between the scores they award on evaluations and the merit increases of the employees being evaluated. *Bayou Manor Health Center*, 311 NLRB 955 (1993). Here, the University put into evidence the University's general guidelines for awarding merit increases and three performance reviews, but there is no evidence that the three employees who were evaluated actually received merit raises and, if so, that the amount was in accordance with the University guidelines. In the absence of any documentary evidence that there is a direct correlation between the ratings assigned to specific employees and the merit raises they received, the University has failed to demonstrate the supervisory status of the basic science faculty on this basis.

I do find, however, that the University has demonstrated with sufficient particularity that those basic science faculty with employees in their labs have authority to hire employees and set their initial compensation levels. Thus, Dean Rosenberg's unrebutted testimony, supported by a list of the employees in each lab and a sample basic science faculty appointment letter indicating authority to hire, demonstrates that it is the basic science faculty who make the actual hiring decisions for their own labs, including whether to hire, the number of employees to be hired, the types of positions to be filled, and the selection of the hirees. Further, the basic science faculty set the initial compensation levels of the newly-hired employees in their labs, subject to some guidelines in the case of research technicians and lab managers and subject to a minimum salary for postdocs. They have total discretion to set the salaries of research-track faculty in their labs and also have discretion to offer other benefits if they choose, as exemplified

by the fact that one basic science faculty member offered to provide relocation assistance to a newly-hired postdoc, while another chose not to.[91]

Power to exercise statutory authority in the interest of the University

Citing *New York University*, 221 NLRB 1148, 1154-1155 (1975) (*NYU II*), SEIU asserts that any supervisory authority exercised by basic science faculty is not exercised "in the interest of the employer," as required by Section 2(11). In *NYU II*, the Board found that principal investigators at a university who hired fellow faculty members to work on their research projects were not statutory supervisors, in part because their supervision of their fellow faculty members was not in the interest of the university. In this regard, the Board found that the research was not performed for the university, was not under control of the university and was not undertaken at the direction of the university. Rather the direction of a research project by a principal investigator was undertaken on behalf of the principal investigator and the contracting agency. Although the principal investigators were paid through the university payroll for their activities, they were paid with funds drawn from their grants, and the contracting agency rather than the university also compensated any "employees" for any time devoted to the research activities. The employees were accountable only to the principal investigator for their work on the contract.

SEIU argues that here, as in *NYU II*, the University has disclaimed any interest in the work performed in the labs, in that it does not review, oversee, or regulate the content of the research or the expenditure of grant monies, that employee reports are not paid by the University except in a technical sense, in that the grant monies originate from and are controlled by the basic science faculty member, and that the lab employees and faculty are not providing any work or product to or for the University, even if the University is a partial underwriter.

The Board considered a series of similar cases in the 1970's, with different results. In *Fordham University*, 193 NLRB 134 (1971) and *New York University*, 205 NRLB 4 (1973) (*NYU I*), the Board the held that lab employees were not employees of

[91] SEIU's argues in its post-hearing brief, citing *Brown University*, 342 NLRB 483 (2004), that postdocs are not employees under the Act, because their status is essentially academic, in that their mission is to be trained as scientists, because their employment is contingent on external grants, and because of the finite duration of their employment, which is limited to one-year terms with a cap of five years. It appears that SEIU is arguing, therefore, that basic science faculty cannot be statutory supervisors to the degree that they supervise postdocs. In any event, this argument has no merit. Unlike the graduate students at issue in *Brown University*, whom the Board found were not employees, postdocs have already graduated and do not pay tuition or receive grades. The employment of many other types of lab employees, including technicians and research-track faculty is also contingent on external funding, which does not, in and of itself, exclude them from employee status. Nor does the fact that postdocs are employed for a year at a time with a cap of five years preclude a finding of employee status. Even if I were to agree with SEIU that postdoc scholars are not employees, which I do not, the basic science faculty would still be statutory supervisors to the degree that they supervise lab technicians, lab managers, and research-track faculty.

the university, so that the principal investigators' supervision of lab employees did not render them statutory supervisors.

In *Northeastern University*, 218 NLRB 247 (1975) and *Rensselaer Polytechnic Institute*, 218 NLRB 1435 (1975)(*RPI*), the Board found that principal investigators who supervised lab employees were supervisors, distinguishing *Fordham* and *NYU I* on the ground that the employees in those cases were not employees of the universities. Thus, in *Northeastern University*, the Board found that the lab employees were employed by the university because they were paid by the university and received the same fringe benefits and payroll deductions as other employees, while in *RPI*, the parties stipulated that the lab employees were employees of the university.

In *NYU II*, cited by SEIU, in which the Board found that principal investigators were non-supervisory employees, the Board relied, in part, on the fact that, in the majority of cases, the principal investigators exercised supervisory authority over their fellow faculty members only for two months during the summer. The Board noted that it does not exclude individuals as supervisors because they seasonally supervise unit members while working in the same manner as other unit members during the bulk of the year. It distinguished *Northeastern* and *RPI* on the ground that there was no indication that the supervision by principal investigators in those cases was seasonal and/or or that it was not exercised in the interest of the employer. *NYU*, supra at 1155, fn. 11.

Finally, in *University of Vermont*, 223 NLRB 423, 426-27 (1976), the Board, citing *RPI*, found that the principal investigators who administered and controlled large grants were statutory supervisors, where they hired and oversaw the work of research associates who were included in the unit for a specific project.

Relying on *University of Vermont*, the most recent in this series of cases, I find that the basic science faculty exercise supervisory authority over their lab employees in the interest of the University. I note that, unlike the principal investigators in *NYU II*, there is no evidence that the basic science faculty at issue in this case exercise supervisory authority only on a seasonal basis.

More important, the facts support a finding that the basic science faculty exercise their supervisory authority in the interest of the University. While it is true that the University may not control the content of the research performed by basic science faculty or control the expenditure of their grant monies, the University has a definite interest in its basic science faculty conducting scientific research. Thus, one of the primary missions of the School of Medicine is to conduct research that impacts human health. The University benefits from the prestige accorded to universities whose renowned scientists conduct important research. The University also has a direct financial interest in the grants received by basic science faculty, in that the grants to faculty come with millions of dollars in indirect recovery costs that flow directly to the University. Finally, the University itself funds much of the research itself by paying millions of dollars in lab start-up costs, interim funding when grants lapse, and ongoing funding to the degree that basic science faculty are only required to fund a percentage of their costs with grants. To

that degree, the supervision of lab employees who contribute to the work performed in the research labs is "in the interest of the employer.[92]"

Supervision of non-unit employees

The Board applies an additional test where, as here, individuals are alleged to exercise supervisory authority over employees who are not themselves in the bargaining unit. In these circumstances, the Board makes a complete examination of all the factors present to determine the nature of the individuals' alliance with management. Relevant factors to be considered will include, but not be limited to, the business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as supposed to those of the bargaining unit in which they would be included. Time spent in performance of supervisory duties is relevant, but not controlling, to the analysis.[93] Where the performance of supervisory functions is "part and parcel of their 'primary work product' rather than an ancillary part of their duties," the Board has concluded that the individuals are 2(11) supervisors. *Detroit College of Business*, 296 NLRB 318, 321 (1989).

I find this case analogous to *Legal Aid Society of Alameda County*, 324 NRLB 796, 797 (1997), in which, applying the *Detroit College of Business* test, the Board found that nonunit paralegals who drafted briefs and pleadings for an attorney's signature were directly and substantively engaged in producing part of the attorney's primary work product and did not perform work that was merely adjunct to that of the attorney, such as that of a secretary. Therefore, the attorney's authority to evaluate and effectively recommend the retention and termination of the paralegals made her a supervisor. Here, lab employees such as research assistant professors, research associates, postdoctoral scholars and, arguably, research technicians are directly and substantively involved in producing the primary work product of the basic science faculty, i.e., scientific research.

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[92] To the extent that the cases in which the Board found principle investigators to be statutory supervisors relied on a finding that their supervisees were employees of the university, I find that the lab employees in this case are also employees of the University. In this regard, I note Dean Rosenberg's unrebutted testimony that the lab employees are employees of the University. The fact that the lab employees are covered by a University employee handbook and the involvement of the University's Human Resources Department in the hire and discipline of lab employees as well as in their requests for medical leave and parental leave further underscores their status as employees of the University.

[93] In *Detroit College of Business*, the Board overruled *Adelphi University*, 195 NLRB 639 (1972) and its progeny to the degree that it established a rule that any individual who supervises nonunit employees less than 50 percent of his time is not a supervisor. In its post-hearing brief, SEIU urges, only in the event that faculty with employee reports are deemed to be statutory supervisors, that the Board restore the *Adelphi* standard requiring an individual to supervise nonunit employees for a majority of work time in order to be excluded as a statutory supervisor. This is a matter that can only be resolved by the Board.

Their work is not ancillary to that process, such as that of a secretary. Thus, the role of the basic science faculty in hiring them is a primary rather than an ancillary part of their duties.

As in *Detroit College of Business*, the particular supervisory function being exercised here, hiring, is one of the most significant of the supervisory indicia. In these circumstances, I do not rely on the percentage of time that the basic science faculty spend performing supervisory duties. *Union Square Theater Management, Inc.*, 326 NLRB 70, 71-72 (1998) (finding that technical directors who hired non-unit employees from time to time were statutory supervisors without relying on the amount of time spent on hiring). In sum, I find that the role of the basic science faculty in hiring non-unit lab employees warrants their exclusion as statutory supervisors.

SEIU argues that, because basic science faculty may choose to hire employees or not at their discretion, and many do not, they are not hired with the expectation that they supervise employees. Therefore, SEIU contends, supervision of employees is not part of their primary work product. I disagree. The fact that not all basic science faculty choose to hire lab employees does not mean that hiring lab employees is not part of the primary work product of those that do choose to hire employees. That the hiring of employees is an expectation of basic science faculty, albeit optional, and thus part of their primary work product, is exemplified by Assistant Professor Gaglia's appointment letter, noting her option to hire a research technician.

Status of basic science faculty who do not hire lab employees

The University asserts that even those basic science faculty who have not supervised employees should be excluded as supervisors, because they may do so at any time by securing grants and hiring employees to work with them. I reject the contention that the theoretical possibility of hiring lab employees in the future transforms those basic faculty members into statutory supervisors. Even as to those of them who have had lab employees at some point in the past between 2010 and 2015, there is no record evidence that they have any future plans to hire lab employees.

Accordingly, I find that those basic science faculty who currently have lab employees are statutory supervisors, while those who do not currently have lab employees are not statutory supervisors. *Northeastern University*, 218 NLRB 247, 253-254 (1975) and *University of Vermont*, 223 NLRB 423, 427 (1976) (principle investigators who hire and otherwise oversee the work of research associates and/or faculty are statutory supervisors, while those not exercising supervisory functions shall be included in the unit).[94]

[94] In *Northeastern University*, the Board conceded that the number and identity of supervisory principal investigators might change from year to year, as faculty members might pop in and out of the unit as their grants issued or expired, resulting in the creation of a "popcorn unit." While acknowledging the problems that can be created in this situation, the Board nonetheless determined to exclude those principal investigators who had employees working for them on their grants and to include those that did not.

Inclusion of Associate Professor Alvar Gustafson and Associate Professor Peter Brodeur

Associate Professors Alvar Gustafson and Peter Brodeur are two of four basic science faculty members who do not run a research lab. The two other basic science faculty who do not have labs, Professors David Damassa and Stanley Jacobson, are in the petitioned-for unit.

Gustafson serves as faculty director of the MBS program. He is the chair of the MBS Steering Committee and also sits on its Curriculum Committee. Gustafson negotiates with one of the associate deans for the Public Health and Professional Degree Programs over the number of scholarships to be awarded to MBS students, although the number is ultimately decided by that associate dean. In addition to his duties as faculty director of the MBS program, Gustafson also teaches in the MBS program, at the Sackler School and at the University's Dental School.

As MBS faculty director Gustafson appoints new course directors for the MBS program, after negotiating with the faculty member and the relevant department chair. Gustafson does not have authority to assign courses to faculty over their objection. Dean Must does not approve his decisions about new course directors.

Gustafson proposed to Dean Must the creation of the position of associate director of the MBS Program. Dean Must testified that Gustafson and basic science faculty member John Castellot developed a position description for associate director of the MBS program and that she made no substantive changes to the duties outlined in the position description. In June 2015, Gustafson announced the appointment of Castellot to the post. From the announcement, it appears that Castellot had already been performing some of the duties of the position, and there is no evidence that his compensation was increased as a result of the appointment. The record does not reveal the process leading to the appointment of Castellot or whether Gustafson was the sole decision maker.

Dr. Must testified that Gustafson supervises MBS Program Manager Vivian Stephens-Hicks. Stephens-Hicks handles day-to-day issues for the MBS program, such as responding to requests for update letters from medical schools, handling scheduling issues, assisting students who wish to change their academic partner, putting together a thesis guide for MBS students, and organizing thesis workshops. Dean Must testified that Gustafson gives Stephens-Hicks work to do and that they work extremely closely together, that Stephens-Hicks performs a mix of routine and non-routine tasks, that she is highly competent, and that Gustafson has confidence in her ability to perform the routine tasks. Gustafson completes performance evaluations for Stephens-Hicks, and Must does not review them.

Brodeur is the Director of the Division of Medical Education. As noted above, the Division of Medical Education serves as an academic home for those faculty whose primary responsibility is teaching medical students and MBS students. The Division of

Medical Education is part of the Integrated Physiology and Pathobiology Department and is not a department-level organization.

The report of the 2013 committee that recommended the creation of the Division of Medical Education recommended that the Division Director would evaluate teaching faculty, determine teaching load, hire new teaching faculty in Anatomy, Tissue and Organ Biology, and possibly Core Pathology, staff those courses, and manage the Anatomical Gifts Program. There is no record evidence of Brodeur's actual duties.

SEIU contends that Gustafson and Brodeur do not share a community of interest with the petitioned-for basic science faculty because they do not run research labs. SEIU also contends that the two should be excluded from the unit as supervisors and/or managers. The University contends that there is no basis to distinguish Gustafson and Brodeur from any of the other petitioned-for basic science faculty.

Because of my determination to dismiss the petition on the ground that all of the basic science faculty are managerial employees, I need not reach the issue of Gustafson's and Brodeur's community of interest with the unit or their individual supervisory or managerial status.[95]

CONCLUSION

In conclusion, I find that those basic science faculty who currently have employees working in their labs are statutory supervisors, while those basic science faculty who do not currently have employees working in their labs are not statutory supervisors. As I also find that the entire petitioned-for unit is composed of managerial employees, it is hereby ordered that the petition in this matter is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by April 19, 2016.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a

[95] To the degree SEIU argues that Gustafson and Brodeur lack a community of interest with the unit because they do not run research labs, I note that SEIU seeks to represent two other basic science faculty members who also do not run labs.

copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: April 5, 2016

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